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DIPLOMARBEIT

Titel der Diplomarbeit

„Legitimate authority.

**An analysis of the theories of Raz, Simmons, Rawls and
Peter.“**

Verfasserin

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angestrebter akademischer Grad

Magistra der Philosophie (Mag.phil.)

Wien, im August 2011

Studienkennzahl lt. Studienblatt:

A 296

Studienrichtung lt. Studienblatt:

Philosophie

Betreuerin:

Univ.-Prof. Mag. Dr. Herlinde Pauer-Studer

Abstract

In this paper I aim to analyze different conceptions of legitimate political authority, arguing that only a theory which also incorporates insights provided by theories of democratic legitimacy can account for a fully convincing argument. I first define the notion of legitimacy, contrasting it with other normative concepts, namely “legality” and “justice”. Second, I systematize theories of legitimacy based on their understanding of authority and the “normative conditions” they apply. Detailed evaluation will be provided for the conceptions of Joseph Raz, John Simmons, John Rawls and Fabienne Peter. I conclude that politics must be founded on reasons and a certain process of justification. Only if those conditions are satisfied, a political authority is legitimate. However, this does not answer the question whether democracy is necessary and itself a condition for legitimate political rule.

Key words: authority, legitimacy, democracy, reasons, justification

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I. INTRODUCTION

Politics are a constant aspect of reality. We are all subjected to political authorities, most commonly national governments, and this means we are all subjected to their rule. What makes political rules special, though, is that they have the form of law. It is collectively binding, coercively enforceable and hence a matter of obligation. For the most part, at least under reasonably effective authorities, one cannot *not* comply with law, because transgressions are punished or control is exercised so that failure to comply simply is not possible. From the viewpoint of political theory, there are two ways to deal with this. One way is to describe what it takes for an authority to actually be effective and how this makes it relate to its subjects. The other way is normative. From a moral perspective, the fundamental question is how it can even be that we are under someone else's authority. What does it take for us to be obligated to subject ourselves to someone else's will?

Theories of legitimacy aim to answer this question by proposing normative conditions to the authoritative rule. The more an authority lives up to those conditions the more legitimate it is. If it is legitimate, this means that at the very least the authority is morally permitted to impose its rule. Some go even further and argue that it establishes a duty of the persons themselves to subject themselves to the authority. In any case, legitimacy is fundamental, because it constitutes a certain relation between the two involved parties; a relation which is best described as morally significant, because it tells us something about the basic rights and duties of both sides. In the present paper I have therefore decided to adopt a normative view and question what conditions can render a political authority legitimate. Quite obviously, there are various different conceptions and they radically disagree on which moral requirements are appropriate. My argument will therefore consist of two parts.

Part one is meant to provide some preliminary clarifications that will be relevant due to the course of this paper. In particular, this means that I will explicate the two central concepts of my work, “authority” and “legitimacy”. Note that it is necessary to distinguish the notions I endorse from related questions and issues. For example, it is vitally important not to confuse the concept of legitimacy with other normative ideals like “justice” or “legality”. At the same time, it would be equally detrimental to neglect the distinct nature of political authority as compared to other relations of hierarchy or power. In the context of my work I will furthermore rely on the assumption that legitimacy is a normative concept which applies particularly moral claims to the authoritative rule. This view requires justification as it may not be obvious how morals fit into the sphere of political decision-making. Finally, part one of this paper is also meant to outline the analytical approach and concrete research question of my work.

Part two then contains the substantive analysis of four distinct conceptions of legitimacy. This means that I will analyze potential sources of normativity in the context of political authority. The core question is what exact condition can most plausibly establish legitimacy. For this purpose I turn to the work of Joseph Raz, John Simmons, John Rawls and Fabienne Peter and argue that their conceptions of legitimacy fundamentally differ in the “normative condition” they apply to political authorities. Joseph Raz proposes an instrumental approach, arguing that an authority is legitimate if its rule leads to beneficial consequences. John Simmons, on the other hand, argues that only actual consent of particular individuals can ground a legitimate rule. In contrast, John Rawls argues that it is not actual but hypothetical consent, or reasonable acceptability and an overlapping consensus, which establishes legitimacy. Fabienne Peter adopts a different approach in that she defends a purely proceduralist conception. That is to say, in her view only a deliberative democratic procedure which is built on the values of political equality and epistemic fairness is legitimate.

Note that in part two I proceed by firstly explicating the framework of each theory, then I turn to evaluate its plausibility. This means that I first examine how the theorists conceptualize legitimate authority in general, for instance which properties and virtues they ascribe to it and why they believe legitimate authority is different from other sorts of authoritative rule. In addition to that I then give a more detailed outline of the normative condition they propose, i.e. of the properties they suggest render an authority legitimate. Following that, I then turn to analyze the plausibility of each theory. On the one hand, this means that I evaluate the

persuasiveness of their argumentation, on the other it also requires me to test the plausibility of the so-developed normative condition. In the end I shall not only be able to draw a conclusion regarding the merits and holes of each theory, but also determine how they fare compared to each other. My argument will have a constructive form, with insights gained from preceding chapters fundamentally shaping the claims I make in succeeding sections of my work.

II. PRELIMINARY CLARIFICATIONS

The present chapter is meant to provide some preliminary clarifications that will be relevant due to the course of this paper. In particular, this means that I will give an outline of the approach and subject of my work, but also distinguish my own focus from related questions and issues. Since my argument will revolve around two central concepts, “authority” and “legitimacy” I will concentrate on elaborating the notions I endorse.

Regarding the concept of authority, I will only be concerned with *political* authority within the context of this paper. This is relevant, because I will point out a variety of ways in which political authority is special, and indeed distinct from other forms of authority. Second, it is also important that I adopt the common view that political authority is, for the most part, *practical* authority. This points to the fact that *power* is an important element, but we should not make the mistake to think that we can reduce one to the other. Third, when it comes to conceptions of authority, we need to distinguish between descriptive notions and normative theories. As for this paper, I will only deal with the latter, focusing on the normative concept of legitimacy.

Note that while it is commonly accepted that legitimacy is in fact a normative concept, I urge that we must not assume that it is the *only* normative conception of political authority. Instead, “justice” and “legality” can also be understood this way. What distinguishes the three concepts, I maintain, is that they are unequally demanding. That is to say the normative claims they make are of a different weight; legality being least demanding, justice being most demanding and legitimacy representing some sort of middle ground. I will briefly sketch all three notions in order to clarify the scope I ascribe to legitimacy. This will reveal its distinctness, but is also meant to show that those concepts are nevertheless related, because

their claims are all founded on morality.

On the basis of these examinations I last turn to clarify the approach and research interest of this paper: the normative conditions of legitimacy. That is to say, in the main part of my work I will turn to analyze potential sources of legitimacy, the core question being what exact condition can render a political authority legitimate. I turn to the work of Joseph Raz, John Simmons, John Rawls and Fabienne Peter and argue that their conceptions of legitimacy fundamentally differ in the “normative condition” they apply, i.e. in the idea of what makes for a legitimate authority, what the source and condition of legitimacy is. I give a brief overview of those conditions, before later turning to a more comprehensive evaluation.

1. “Authority”

1.1 Political authority

The first thing that comes to mind when we speak of authority is that it is not obvious what kind of entity we refer to. Quite certainly it could be both, a person (or set of persons) or an institution, perhaps even a whole institutional system. However, in general *to have authority* is to have authority over a certain range of actions or issues; it is authority “*over certain persons, and with respect to certain matters*” as Leslie Green put it¹. He gives the examples of family, school, church, army and state in order to illustrate his point that there may be several separate entities claiming authority over a particular individual at the same time². As for the context of my own paper, Green's clarification is important, because I will be concerned, not with all kinds of authority, but with political authority only.

Turning back to the beginning, one might then be tempted to reiterate the question what kind of entity *political* authority refers to. As a matter of fact, it is not obvious (or universally accepted, for that matter), that “political authority” should be equated with *state* authority. Quite a few theorists have actually pointed out that there is an important distinction between

¹ Green, Leslie: *The authority of the state.*, Clarendon Press, 1988, p. 42

² See Green, Leslie: *The authority of the state.*, Clarendon Press, 1988, p. 63.

state and government, and that this needs to be acknowledged in studies concerning authority (especially legitimate authority)³. I accept this demand, but due to the limited scope of this paper I nevertheless choose not to elaborate on it. This is to say, my reasoning will rely on a conception of political authority that does not enforce the distinction, but treats “state” and “government” as closely related and, for the purpose of this paper, as interchangeable. This approach can be justified, because the theorists whose work I aim to analyze deploy different understandings of what entity “political authority” refers to. In neglecting the proposed distinction I remain able to treat those concepts as comparable, without losing too much time examining a difference that is not the central focus of this paper. What I aim to analyze are conceptions of *legitimate* authority, with the emphasis being on the conditions of legitimacy rather than on the characteristics of authority itself. Note that this implies that my use of “political authority” remains open to further examination regarding its relation to either state or government. This analysis, however, escapes my present research and would have to be pursued elsewhere.

Hence when I use the notion of political authority throughout this paper, I have in mind a “*system of animated institutions that govern the territory and its residents and that administer and enforce the legal system and carry out the programs of government*”⁴. This matches the idea of a territorial nation state as we live in today, but does not prescribe it. Neither does it prescribe a specific form of political organization or government, or does it exclude economic and social institutions relevant for carrying out political programs. For example, there is no stipulation of a necessary separation of powers, or of a particular form of government (e.g. democratic vs. non-democratic). The notion nevertheless remains true to the every-day experience that political authority, in general, is not exercised as a merely personal relationship between individual human beings, but “*in the context of institutions*”⁵.

A few more things that have to do with the unique nature of politics are essential to note here. First, political authority is *wide* in scope⁶, because it applies to “*many people*”. Arguably, it applies to more people than most other authorities do, that is if we compare, for example, the average nation state with “family” (understood as a particular family) or the army. Second,

³ See e.g. Buchanan, Allen: Recognitional legitimacy and the state system, In: Philosophy and Public Affairs, Vol. 28, No. 1, 1999 for an argument how state and government legitimacy require different sorts of arguments.

⁴ Copp, David: The idea of a legitimate state., Philosophy and Public Affairs, Vol. 28, No. 1, 1999, p. 7

⁵ Green, Leslie: The authority of the state., Clarendon Press, 1988, p. 42

⁶ See Green, Leslie: The authority of the state., Clarendon Press, 1988, pp. 83-86.

political authority is *comprehensive*⁷, in that it has a say over a broad set of issues. We simply need to look at the variety of policy sectors in any given country today, ranging from education and health to security and arts/culture, to confirm this statement. Third, political authority does not only claim to regulate a broad set of issues for a wide set of persons, it is special, above all, because it concerns the “*vital interests of everyone*”⁸. This is true in two ways. On the one hand, politics do not stop at every-day coordination issues, but it steps in where people's lives are affected *fundamentally*. For example, John Rawls argued that political decisions shape the “*basic structure*” of society, i.e. the “*main political, social, and economic institutions, and how they fit together*”⁹, and this has profound effects on people's prospects and chances in life as well as on their attitudes. On the other hand, political authority affects people fundamentally also because it is primarily concerned with making collectively binding decisions¹⁰. Politics creates law, i.e. the rules that every subject is bound to abide by. What is more, those rules are enforceable and hence a matter of coercion. This means that, fourth, political authority stands out because of its characteristic *means*, i.e. (physical) coercion, which it claims an exclusive right to, at least within the nation state.¹¹ Note that in this latter sense political authority seems to maintain supremacy over other forms of authority, because it claims a monopoly on the use of force.

1.2 Practical authority and the notion of power

In the previous section I have pointed out that the subject of this paper is particularly *political* authority as opposed to other forms of authority, such as that of science or religion. I have also clarified what I take to be the distinct nature of politics and why I deem it justified not to distinguish between state and government throughout the course of this paper. One of the arguments I have made is that political authority is unique for the monopoly it claims to (physical) coercion. This points to another important distinction that is commonly made in regards to authority: that between practical and theoretical authorities.

⁷ See Green, Leslie: *The authority of the state.*, Clarendon Press, 1988, pp. 83-86.

⁸ Green, Leslie: *The authority of the state.*, Clarendon Press, 1988, p. 83

⁹ See Rawls, John: *Political Liberalism.*, Columbia University Press, 2005, p. 11. Note that I use his argument in a slightly simplified version here, because for Rawls, the basic structure of society has much graver implications. He presupposes that it refers to a “closed” (ibid, p. 12), “democratic” (ibid. p. 11) society that members enter only by birth and leave only by death (ibid. p. 12).

¹⁰ See e.g. Dahl, Robert: *Democracy and its critics.*, Yale University Press, 1915, pp. 106-107.

¹¹ See e.g. Green, Leslie: *The authority of the state.*, Clarendon Press, 1988, pp. 75-80.

As a matter of fact, many theorists endorse the view¹² that political authorities are *practical* authorities in the sense that their commands require action, not belief. This is contrasted with so-called *theoretical* authorities that, as experts within certain areas, give reason to belief, but do not impose a duty to take a certain action. Heidi Hurd has suggested an even more elaborated distinction when she proposed that we can classify authorities according to the sort of utterances they make: *epistemic* authorities are in a position to offer “good advise” on how others ought to act, *influential* authorities on the other hand may request actions, but only *practical* authorities can issue commands¹³. I deem those distinctions relevant in the present context, because they shed some light on the kind of relation we talk about when we speak of authority. It is a relation where one party, the authority, makes a certain sort of claim against another party, the subject. The claim they make is a command, it is claim to action (or omission of action), and it is a claim that is effective regarding a certain set of persons who have to subject to them.

In this sense, political authority might be understood as a relation of power, because individuals can be made to do something they might not want to do¹⁴. However, I urge that it is of the utmost importance not to confuse those two concepts. Power is an important feature of political authority – as it is for practical authority in general, one might argue. Yet, while political authority may always involve power, not all power relation is tantamount to political authority. Put differently: Power constitutes (or at least can constitute) authority in some contexts, but it is not sufficient to constitute political authority. The interesting question, it seems, is not even about power, but about how else a political authority takes effect, how else it compels action in its subjects. As we will see, this is one of the key points where legitimacy can come into play, because in most theories legitimate authority is seen to evoke obligation on part of the subjects. In this case, duty and not power may be the appropriate explication of the relation between an authority and its subjects.

¹² For an overview on this distinction see e.g. Christiano, Tom: Authority., In: Stanford Encyclopedia of Philosophy, 2008 (online at <http://plato.stanford.edu/archives/fall2008/entries/authority/>); last visited on 12 December 2010, 01:25).

¹³ See Hurd, Heidi: Moral combat., Cambridge University Press, 1999, pp. 63-67.

¹⁴ Note that this understanding of power is inspired by Max Weber and can for example be found in Christiano, Tom: Authority., In: Stanford Encyclopedia of Philosophy, 2008 (online at <http://plato.stanford.edu/archives/fall2008/entries/authority/>); last visited on 12 December 2010, 01:25).

1.3 Normative vs. *de facto* authority

The previous sections have been meant to clarify the sort of authority I will deal with in the present paper (political authority) and the effective nature I ascribe to it (practical force). In the present section I now turn to a third distinction, that between *descriptive* and *normative* approaches to authority¹⁵.

Descriptive theories of authority try to capture the spirit of real-life instances of “authority”, generalizing the most important features they all share. A person, institution or system is thus called an authority if it actually lives up to those descriptions. Quite often, whether or not something or someone qualifies as an authority is seen to depend on the perception or attitude of those who would be subject to it¹⁶. For example, *issuing commands that are generally obeyed by a certain group of persons subject to it*¹⁷ could be named as the key qualification. As a consequence, authority is not seen to rely on any independent or moral standard, but on its effect or efficiency. This is why authority in this descriptive sense is often referred to as *de facto* authority, i.e. an authority that is such qua acting and being accepted as one.

In contrast, one can construe normative notions of authority in one of two ways; either dealing with their creation and existence or with their rule. First, authority can be dealt with normatively by defining conditions of what ought to be acknowledged as authority. On this view, not what is merely accepted as authority, but what satisfies certain other requirements “is” an authority. For example, one could claim that only those people ought to be recognized as authorities that have a certain education. If a person does not have that education, he must not be an authority at all. Note that this argument is not normally cited under the flag of “normative authority”, but we can find a lot of similar argumentations when it comes, for example, to discussions regarding the moral status of the current world order. Some theorists actually suggest that before we talk about the “normatively right” exercise of authority, for example by states, we should question whether the state system ought to exist that way at all

¹⁵ See e.g. Christiano, Tom: Authority., In: Stanford Encyclopedia of Philosophy, 2008 (online at <http://plato.stanford.edu/archives/fall2008/entries/authority/>); last visited on 12 December 2010, 01_25).

¹⁶ See e.g. Morris, Christopher: An essay on the modern state., Cambridge University Press, 1998, p. 102 for a reference and critique of attitude-based conceptions of (legitimate) authority. (Note that he cites Weber as an example of this view.)

¹⁷ See Christiano, Tom: Authority., In: Stanford Encyclopedia of Philosophy, 2008 (online at <http://plato.stanford.edu/archives/fall2008/entries/authority/>); last visited on 12 December 2010, 01:25).

or how it came to be that way.¹⁸ In contrast, an alternative view does not deal so much with whether or not someone or something ought to be an authority, but applies normative conditions *to* those authorities. This is to say, normative conceptions of this sort presuppose descriptive notions of authority, because they refer to certain entities *as* authorities, i.e. they assume their objects to be authorities without asking whether they ought to be that. Instead their aim lies in the definition of external standards which are applied to authorities and which are meant to provide measures that they should live up to. What they are concerned with is how authorities ought to act or relate to their subjects.

In any case, normative conceptions are fundamentally evaluative¹⁹ notions. They allow conclusions about how “good” an authority is in regards to a certain virtue, i.e. whether or not, and to what degree, an authority lives up to a predefined standard. Note that for those standards to be normative means that not all authorities actually do live up to them, rather they are something they *ought to* live up to. For the context of the present paper, I will deal with authority only from a normative viewpoint, and in doing so I focus on the latter approach. That is to say, I will not deal with the creation of authorities, but only with their exercise of power.

1.4 Authority thus defined

I have clarified that within the scope of this paper I will only be concerned with *political* authority, which is distinct from other forms of authority not least because of its exclusive right to physical coercion within the state. In so far as political authority is usually concerned with commanding ways to act (or not act), it should be understood as *practical* authority. This implies that *power* is an important element of the relationship between an authority and its subjects. Furthermore we can either adopt a descriptive or a normative view; i.e. dealing with either what makes an authority or how that authority ought to be. Within the present paper I choose to focus on the latter approach with the additional restriction that I do not examine “good” ways of gaining authority but only focus on how existing authorities ought to rule. One concept that attempts to answer this question is that of legitimacy and I will outline its

¹⁸ See e.g. Buchanan, Allen: Justice, legitimacy and Self-Determination., Oxford University Press, 2003.

¹⁹ See Peter, Fabienne: Democratic legitimacy., Routledge, 2009, p. 2 for a similar assumption.

significance in the following chapter.

2. "Legitimacy"

2.1 Basic concept and scope

In the foregoing chapter I have suggested that I will deal with authority in the context of legitimacy. Three clarifications are now in order to clarify the meaning of this and to avoid misunderstandings. First, I maintain that legitimacy applies only to the context of politics, in particular to the *exercise of political authority*. Second, I have suggested that legitimacy is a *normative* concept, and third I have presupposed the view that it applies specifically *moral* standards to politics.

On my approach legitimacy is understood as "*a virtue of political institutions and of the decisions (...) made within them*"²⁰ and this is to say that for the present context, legitimacy is treated as a strictly political concept. In other words: The standards defined by legitimacy are that which apply to the specific subject of political authority and cannot be applied to "private" situations unless a separate argument is made to show why this should be the case. Moreover, I add the conceptual limitation that for X to be a legitimate authority is understood to mean that it is legitimate in *exercising* authority. This does not necessarily imply, however, that X is legitimate in being/existing (an/as an authority). For example, to define under what conditions a state can have legitimate authority is not tantamount to stating that only states can have legitimate political authority, or that we need states to create it, or that the current world order of states is legitimate. Separate arguments would be necessary to found those claims, but those no doubt exceed the scope of this paper. This is why I introduced the two notions of "normative authority" in the previous chapter. There is a difference between examining what makes for a normatively sound creation of authority and what it takes for this authority's rule to be legitimate. Both questions are essential, but in this paper I focus only on the latter aspect.

²⁰ Peter, Fabienne: Political Legitimacy., In: Stanford Encyclopedia of Philosophy, 2010 (online at <http://plato.stanford.edu/entries/legitimacy/>, last visited on 3 December 2010, 15:25)

Apart from that, a further clarification concerns the application of legitimacy to the subject of political authority. Note that traditionally there has been disagreement, not so much about the political nature of legitimacy, but about whether “authority” is the appropriate focus. For example, this has been pointed out by Fabienne Peter: Instead of talking about authority, some theorists have applied the notion of legitimacy only to the narrower concepts of “political power” or “coercion”.²¹ This controversy can also be located *within* theories of legitimate authority, because here we find discussions about what special functions legitimate authority entails – does it consist only in justified coercion or is there a more extensive right to rule? Does it have a capacity to impose duties or does it even, more fundamentally, create obligation(s) towards a particular authority? I deem those differentiations important, because they point out the various aspects of legitimacy. However, within the scope of this paper I will go along with Christiano's approach which states:

*“It is not a useful aim of philosophers or political thinkers to determine which one of these conceptual accounts of political authority is the right one. Each one of them grasps a kind of legitimacy of political authority that is worth taking into account and distinguishing from the others.”*²²

This is to say that I will not proceed by committing myself to one predefined definition of legitimate authority. Instead I will carefully analyze which definition of authority is actually embraced within different conceptions of legitimacy.

What all of them have in common is that they deal with political authority from a normative viewpoint. However, for the sake of completeness it has to be noted here that this is a focus chosen by me and for the purpose of this paper. Indeed there are also descriptive notions of legitimacy. Those are concerned with the question whether people actually support certain political institutions or decisions – not with whether they *ought* to²³. That is to say that on the descriptive view, political decisions have binding force simply because they have the form of law and are effectively backed by coercive measures. In contrast, normative legitimacy argues that the binding force of authoritative directives is defined by them imposing the (moral) duty to obey²⁴. On the one hand we have effectiveness, on the other obligation. Furthermore,

²¹ See Fabienne: Political Legitimacy., In: Stanford Encyclopedia of Philosophy, 2010 (online at <http://plato.stanford.edu/entries/legitimacy/>, last visited on 3 December 2010, 15:25).

²² Christiano, Tom: Authority., In: Stanford Encyclopedia of Philosophy, 2008 (online at <http://plato.stanford.edu/archives/fall2008/entries/authority/>;> last visited on 12 December 2010, 01_25).

²³ See Peter, Fabienne: Democratic Legitimacy., Routledge, 2009, p. 56.

²⁴ See Peter, Fabienne: Democratic Legitimacy., Routledge, 2009, p. 57.

descriptive legitimacy is measured empirically, referring to people's actual beliefs²⁵. Normative legitimacy, on the other hand, is specified through theoretical principles and can be applied to any political process, even hypothetical ones. It defines moral standards that hold as a measure for evaluating political authority from a viewpoint of morality.

Treating legitimacy not only as a normative, but also as a moral concept, is again a premise set by me. What is interesting is that theorists often put it like “legitimacy” is the only normative concept that can be applied to authority; like the only possible distinction is between legitimate and *de facto* authority. However, it is a fundamental premise of this paper that I do not share this view. Instead I suggest that normative conceptions of political authority can be based on different conceptions of “the good”. Just as legitimacy, “justice” or even “legality” could (analogously) be defined according to moral standards of a different ambition. Furthermore, we must not forget that morality is not the only measure that normative notions can rely on. For example, normative demands can also be formulated based on notions of “efficiency” or “productivity”, both of which need not be moral claims. What I urge to keep in mind is that just as not all theories deal with authority normatively, not all normative theories are moral theories. However, for the purpose of the present paper I will in fact deal with moral-normative perspectives on authority only.

In short I conclude that legitimacy is a normative concept applying to political authorities. In doing so, it presupposes their *de facto* existence; it does not justify their being authorities, but only deals with how they ought to rule. Traditionally, there are three aspects to this – the right to rule, the justified use of coercion, and the obligation on part of the subjects. The demands that legitimacy makes towards authority are moral claims. That is to say, when we speak of a “right to rule”, this is meant to be a *moral* right, just as “justified coercion” refers to *moral* permissibility and the “obligation” is understood as *moral* obligation. The obvious question is: How are the claims of legitimacy distinct from those of other (moral-)normative approaches? This is what I will try to answer in the following section.

²⁵ See Peter, Fabienne: Political Legitimacy., In: Stanford Encyclopedia of Philosophy, 2010 (online at <http://plato.stanford.edu/entries/legitimacy/>, last visited on 3 December 2010, 15:25).

2.2 Contrasting concepts

So far I have established that in this paper I deal with legitimacy as applied to political authorities. I have also introduced the view, that legitimacy is a normative concept whose claims are of a specifically moral nature. The aim of the present chapter is to give an idea of how we can define the substantial scope of those claims, which is relevant, because I suggest that legitimacy is not the only moral concept we can use to evaluate political authorities. Instead, “legality” and “justice” can be construed as analogous views. I want to give an outline of how those two concepts can be distinguished from legitimacy by arguing that the main difference lies in the demandingness of the moral claims they make.

2.2.1 Legality

As I have pointed out, legitimacy is a normative concept which makes moral claims about how political authorities ought to act. In what follows I will sketch an argument for how and under what conditions the same is true for legality. At the same time I suggest that it is actually a less demanding concept than legitimacy, because its moral claims are less substantial.

The first important thing to note is that traditional positivist thinking denies the normative notion of legality. For them it is a descriptive notion, more specifically an empiric condition that is satisfied by the mere existence of and adherence to law. Law itself is not seen to relate to moral considerations, or what Herbert Hart calls “*what ought to be*”²⁶. Instead law establishes “*what is*”²⁷, i.e. rules and norms that actually exist and which have a certain form. As Hart puts it: “*The existence of law is one thing; its merit or demerit is another.*”²⁸ Lon Fuller observed that, on this view, law's function is to create order, but this order need not be “good” in the sense that it “*corresponds to the demands of justice, or morality, or men's*

²⁶ Hart, Herbert: Positivism and the separation of law and morals., In: Harvard Law Review, Vol. 71, No. 4, 1958, p. 594

²⁷ Hart, Herbert: Positivism and the separation of law and morals., In: Harvard Law Review, Vol. 71, No. 4, 1958, p. 594

²⁸ See Hart, Herbert: Positivism and the separation of law and morals., In: Harvard Law Review, Vol. 71, No. 4, 1958, p. 594. (Note that he refers to Austin here.)

notions of what ought to be”²⁹. It means that “legality” is defined by formal, not moral, validity³⁰. Even morally outrageous law thus remains law³¹ and is hence authoritative over its subjects.

In contrast to this positivist approach a conception along the lines of Fuller provides a framework for understanding legality as a distinctly normative notion. He suggests that “*The ‘morality implicit to law’ must be respected if we are to create anything that can be called law, even bad law.*”³² Now what does this mean? Fuller's concern is for the creation, elaboration and workability of law. The basic idea is this: Not anyone can make law, not anything can be called law. In fact it makes sense to speak of “legality” only if certain minimum requirements are satisfied, such as the fact that “*the relevant interpretive methodologies*” do not “*lend complete arbitrariness to the application of law*”³³. Law owes its validity not to legality itself (because this would lead to an infinite regress), but to certain “*fundamental accepted rules*” that specify “*the essential lawmaking procedure*”³⁴. Two questions are bound to arise from those explications: First, what makes this approach a normative one and what do its claims have to do with morality? And second, how does this relate to the subject of authority, when actually all Fuller talks about is law?

As a matter of fact, Fuller's conception of legality is normative, because he defines standards that real-life law *ought to* live up to if it is to count as properly “legal”. Sure enough, not all de facto legal systems actually do live up to those standards (for instance, the Nazi regime is cited as a counter-example because of its excessive use of retroactive statutes³⁵), and so we can classify them according to evaluative benchmarks of “legality” in order to determine their merit. Kristen Rundle has picked up at this point and argues that the distinct normative condition employed by Fuller is the so-called “rule of law”. As she points out “*we can have*

²⁹ Fuller, Lon: Positivism and fidelity to law: A reply to Professor Hart., Harvard Law Review, Vol. 71, No. 4, 1958, p. 644.

³⁰ See Dyzenhaus, David: The Grudge Informer Case revisited., In: New York University Law Review, Vol. 83, 2008, p. 1006.

³¹ See Hart, Herbert: Positivism and the separation of law and morals., In: Harvard Law Review, Vol. 71, No. 4, 1958, p. 600.

³² Fuller, Lon: Positivism and fidelity to law. A reply to Professor Hart., In: Harvard Law Review, Vol. 71, No. 4, 1958, p. 645

³³ Rundle, Kristen: The impossibility of an extermination legality. Law and the Holocaust., University of Toronto Law Journal, Vol. 59, No. 1, 2009, p. 84

³⁴ Fuller, Lon: Positivism and fidelity to law. A reply to Professor Hart., In: Harvard Law Review, Vol. 71, No. 4, 1958, p. 641

³⁵ See Fuller, Lon: Positivism and fidelity to law. A reply to Professor Hart., In: Harvard Law Review, Vol. 71, No. 4, 1958, p. 650.

law without the rule of law”³⁶. However, it is essentially the latter that is morally desirable, because rule of law depends on an “*inner morality of law*”³⁷, that is, a law whose underlying conception of the person is that of a moral agent³⁸. Only if a legal system is created and structured such that the people subjected to it have a chance to live up to its requirements, and only if the execution of law follows predictable patterns, subjects have a chance to live under authority and still remain actors, i.e. in control of their fate. In short, a legal system only establishes a rule of law if it excludes arbitrariness in both the making and application of law.

I am confident that this last point makes it obvious why I argue that legality is a normative concept applicable to political authorities. But why does it relate to political authorities and not just law? The reason is this: Its moral claims are about how law ought to be (made), but below the surface this implies a claim about how an authority, the law-maker, ought to relate to its subjects³⁹, how it ought to treat or not treat them. Note that the requirements it invokes are minimal when regarded from a moral view-point. For example, the specification that there ought to be “*congruence between official action and declared rule*”, or that “*laws should not require conduct that is impossible*”⁴⁰ does not seem to demand much of the political authority, because there is little limitation for the potential making and content of law. Rundle herself admits that law, on this view, still remains “*indifferent to substantive aims*” and that therefore the “*possibility of iniquitous ends*” cannot be precluded⁴¹. Yet, though its claims are not too substantial, legality still demands something, and I argue that this demand has a distinctly moral basis, because it is about how persons are to be related to. This is why I suggest it can appropriately be understood as a normative concept, more specifically one that applies certain moral minimum requirements to political authorities.

³⁶ Rundle, Kristen: The impossibility of an extermination legality. *Law and the Holocaust*, University of Toronto Law Journal, Vol. 59, No. 1, 2009, p. 116

³⁷ Rundle, Kristen: The impossibility of an extermination legality. *Law and the Holocaust*, University of Toronto Law Journal, Vol. 59, No. 1, 2009, p. 80

³⁸ See Rundle, Kristen: The impossibility of an extermination legality. *Law and the Holocaust*, University of Toronto Law Journal, Vol. 59, No. 1, 2009, pp. 89 and 106. Also see Dworkin, Ronald: Philosophy, morality and law. Observations prompted by Professor Fuller's moral claim., In: *University of Pennsylvania Law Review*, Vol. 113, No. 5, 1965 for a similar thought.

³⁹ See Dworkin, Ronald: Philosophy, morality and law. Observations prompted by Professor Fuller's moral claim., In: *University of Pennsylvania Law Review*, Vol. 113, No. 5, 1965, pp. 672-673.

⁴⁰ See Rundle, Kristen: The impossibility of an extermination legality. *Law and the Holocaust*, University of Toronto Law Journal, Vol. 59, No. 1, 2009, p. 81. (Note that she refers to Fuller here.)

⁴¹ Rundle, Kristen: The impossibility of an extermination legality. *Law and the Holocaust*, University of Toronto Law Journal, Vol. 59, No. 1, 2009, p. 105

2.2.2 Justice

I have argued for legality as a normative conception that imposes minimum moral requirements on political authorities. Without having gone into detail, I made the assumption that legality is a less demanding concept than legitimacy, because its moral claims are not substantial. In the following, I now turn to an alternative concept, justice, and sketch an argument for why it can be perceived as other end of the spectrum, i.e. the most demanding version of a moral-normative concept applying to political authority. It relies on the idea that justice imposes heavy demands on the substance of authoritative directives and that its scope is wider and more universal than that of either legality or legitimacy.

The first important thing to notice in the context of theories of justice is that there is actually no univocal agreement on the fact that justice is actually a concept distinct from legitimacy. It is a fact that ever since John Rawls' publication of "A theory of justice"⁴², there has been a revival of normative political theory⁴³, yet terminology varies and what some authors argue for under the flag of "justice" is an exact match for other's conception of legitimacy. This is why in the present context I cannot rely on an obvious or even commonsensical approach for discriminating between the two. However, it is quite commonly accepted throughout the discourse is that if legitimacy is distinct, it is "*related to but weaker than justice*"⁴⁴. In many cases it is treated as a "*normative minimum*"⁴⁵, less demanding than justice and therefore achievable even under imperfect circumstances. On my account it is not legitimacy, but legality which is the appropriate conception of a normative *minimum*, but I nevertheless agree that justice is more demanding than legitimacy and indeed specifies a normative *maximum*, i.e. ideal requirements for political authority. That would then leave the "middle position" to legitimacy.

In fact, there may be two ways to justify my claim that justice specifies the moral maximum. One is indicated by Fabienne Peter, who suggests that theories of justice are usually concerned with the substance of policies, while legitimacy is often conceptualized in terms of

⁴² See Rawls, John: A theory of justice., Harvard university Press, 2001 (first printed 1971).

⁴³ See Peter, Fabienne: Democratic Legitimacy., Routledge, 2009, p. 57 for a brief overview of how Rawls' writing influenced the development of political philosophy.

⁴⁴ Peter, Fabienne: Democratic Legitimacy., Routledge, 2009, p. 58

⁴⁵ Peter, Fabienne: Democratic Legitimacy., Routledge, 2009, p. 56

procedure. On this perspective, justice answers questions of “*what*⁴⁶ *is owed to people*”⁴⁷ and in most cases it is thus concerned with distributive issues. In contrast, the concept of legitimacy is seen to apply to political procedure, e.g. “*how*⁴⁸ *decisions about distributive policies ought to be made*”⁴⁹. I suggest we should be cautious about accepting this view, because not all conceptions of legitimacy are indeed procedural (although Peter's is, as we will see in a later chapter of this paper). Yet I do believe that there is truth in Peter's observation: If we are to measure the demandingness of moral claims, one thing to consider is substance. As we have seen, legality only imposes minimal normative requirements on political authorities and this can, for instance, be gathered from the fact that there is almost no limitation to the potential content of policies/law. All it requires is that there is some inner consistency and reasonableness to the systemic whole of law, but there is no explicit limitation to its substance. In contrast, theories of justice often center around distributive issues, which is an indication for the fact that substance matters. When determining the justice of an authority's rule there is likely to be a focus on the kind of directives it utters, the content of the laws it enacts, and in this sense, I suggest, it is more demanding than legitimacy.

A second way of arguing that justice is indeed demanding is to focus on its target: Some theories of justice criticize the idea that there is a difference between the relationship a state (or government) has with its own subjects, the citizens, and that which it has to persons who are not members of or subject to their authority⁵⁰. Most commonly, this kind of assumption is explicated by arguing that different standards of justice apply to an authority as it acts towards its subjects and towards “others” (be it other authorities or other's authorities subjects). For example, an authority might be required to ensure economic re-distribution among its subjects, but not among all human beings. While it is not my aim here to discuss this particular conception of justice, I do insist that there is a significant thought here: Normative claims regarding political authority can be more or less demanding depending on how far their consideration goes. Put differently, it matters whether we impose demands only on how a political authority ought to act towards one person, or a certain group of persons, or all people. Legality and legitimacy are both primarily concerned with how political authorities

⁴⁶ Note that this emphasis was added by myself, not the author.

⁴⁷ Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 1

⁴⁸ Note that this emphasis was added by myself, not the author.

⁴⁹ Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 1 (Also see pp. 56-57.)

⁵⁰ See Buchanan's distinction of internal and external justice requirements (as can be found in his book “Justice, legitimacy and self-determination. Moral foundations for international law.”, Oxford University Press, 2003) or Rawls' discrimination between justice/legitimacy within closed societies as opposed to the “law of peoples” (see his “The law of peoples” (1999), “Political Liberalism” (1993), “A theory of justice” (1971)).

ought to relate to their subjects. Justice, on the other hand, should probably also regard how those authorities behave “in general”, that is, towards all other people too. Note that this does not call for the conclusion that a just authority has to treat everyone the same way; all it asserts is that it matters how a political authority acts towards anyone, be it their subject or not. There may still be different sets of normative requirements applying in the one case and in the other, but nevertheless, for the overall evaluation it matters whether the authority lives up to both.

In sum, I thus conclude that justice is a more demanding concept than legitimacy in the sense that its moral claims impose more substantive restrictions on the government and that its scope is more universal, considering not only the authority's relation to their own subjects but going well beyond that.

2.3 Sources of legitimacy

Up to now I have made an attempt to distinguish legitimacy from other normative concepts that make moral claims towards political authorities. The basic argument was that legitimacy represents a sort of middle ground between legality and justice when it comes to the demandingness of its moral claims. On the one hand, it is more demanding than legality, because it is not only concerned with the “inner morality” of the authoritative system, but it imposes some restriction on its substance too. On the other hand, it is less demanding than justice, because (just as legality) it is concerned primarily with the relation between the authority and its subjects, and does not consider “external” relations. Moreover, its claims regarding content should only be perceived as “minimum” requirements while those of justice are more aspirational.

With the scope of legitimacy so clarified, I can now turn to the fundamental question of this paper: What *are* the normative conditions of legitimacy? What sources does it stem from and what moral claims does it make? Obviously, the answer to this question varies across different conceptions of legitimacy. In this paper I distinguish four potential sources – beneficial consequences, consent, reasonableness and proceduralism⁵¹ - and pick an example for each in

⁵¹ See Fabienne: Political Legitimacy., In: Stanford Encyclopedia of Philosophy, 2010 (online at

order to explicate the approach. The aim is to examine the theories' argumentation and to assess the plausibility of their moral claims. The leading questions are: What is the “normative condition” applied by each conception? How is its use justified? And: Does this make for a plausible explanation of moral requirements in the context of political authority?

In order to answer these questions I will firstly turn to the theory of Joseph Raz and argue that in his conception, legitimacy stems from beneficial consequences. At the center of his thinking we find the “Normal Justification Thesis” which suggests that authority's directives are obligating for the subjects if this is likely to lead to better compliance to reasons. In fact, this will be one of my main criticisms, because while I find the general *idea* underlying his view appealing – the idea that “reasons” are normatively basic and the central category that moral evaluation should refer to (i.e. that legitimacy depends on whether the authority's rule is supported by good reasons or the right sort of reason-ing) – I criticize that he remains too vague about what this actually means for political authority, or morality in general. He does not offer a convincing account for where those reasons come from, what exact reasons he is talking about and why they are even binding on us.

Second, I turn to the work of John Simmons who has defended “consent” as necessary (and indeed sole) legitimizing condition of authority. One of the key arguments he makes is that individual consent is necessary because of the natural freedom of persons. In his view only voluntary choice can bind particular individuals and create obligation towards an authority. However, in my examination I will raise some serious doubts about this understanding of freedom and instead suggest that normativity stems not so much from our actual choices, but rather from the fact that there are some choices that we *ought to* make. His theory cannot provide a solution for where this “ought” could come from, though, and this will be my main objection against his approach.

The third account I will look into is that of John Rawls. He argues that legitimacy requires that the exercise of authority is guided by a *political conception of justice*, i.e. a conception of justice that can be justified based on reasons that all fair-minded and rational persons could accept. The normative condition he applies is “reasonable acceptability”, because legitimacy means that “reasonable” (fair-minded) persons would be able to accept the authority's rule.

<http://plato.stanford.edu/entries/legitimacy/>, last visited on 3 December 2010, 15:25) for a similar differentiation.

This is significant, I suggest, because through this explication one can remedy one of the main weaknesses we find in the theory of Raz; the question what kind of reasons it is that ought to govern the exercise of authority. Rawls provides an answer to that, and I deem it a convincing one. However, what I do not find entirely satisfactory is the merely hypothetical justification he requires. All he asks for is that an authority, in relating to its subjects, is *able* to justify its rule in a certain way. He does not require, though, that they actually do engage in justification, so how do we know we rely on the “right” reasons?

Last, I turn to the work of Fabienne Peter, whose work stands out because she explicitly rejects the assumption that legitimacy is a virtue of political authorities that can be realized regardless of their mode of government. Indeed she claims that it is only through a certain process of reasoning and justification that legitimacy can be realized. This process cannot be a merely intellectual or hypothetical one, but it needs to be an actual part of political reality and it is valid only if all subjects are included. This, she claims, requires democracy and thus legitimacy is dependent on a democratic mode of government. The main difference to Rawls' approach is that he contends with defining the *sort* of reasons which should govern the process, while Peter argues that the process of determining the “right” reasons is itself what constitutes legitimate authority. It has to be questioned, however, whether this claim is plausible and whether her line of argument succeeds in defending democracy as a requirement of legitimacy.

3. Approach and research interest

In the previous sections I have defined the approach and subject of this paper by explicating its central concepts and research question. The subject is that of political authority and I aim to deal with it from a normative perspective; i.e. the perspective of legitimacy. So far I have clarified the scope of legitimacy, arguing that it represents a moral middle ground between the less demanding concept of legality and the more demanding concept of justice. In particular this means that legitimacy makes moral claims about the relation between political authorities and their subjects and these claims impose minimum substantial requirements regarding the exercise of authority.

Different conceptions of legitimacy can be classified according to various categories. Option one would be to focus on the appropriate subject of legitimacy, for example, whether it regards political authority, certain institutions or merely the decisions made within them. In my paper I will actually leave aside those distinctions and assume political authority to be the appropriate subject. This can be justified, I suggest, because it is the most comprehensive option available and it subsumes most other alternatives (such as law, governmental institutions, etc.).

Another way to go would be to distinguish conceptions of legitimacy according to the function they ascribe to it. Legitimacy can either be seen to justify coercion, or to ground political obligation, or to grant a right to rule. Again, I decided to leave these distinctions aside, because while I deem them relevant I do not believe that this is the most interesting issue when regarded from a normative viewpoint.

The last and, to me, most essential distinction regarding conceptions of legitimacy can be made by reference to the “normative condition” that is applied. That is to say, conceptions of legitimacy most fundamentally differ in what they assume to be the source of legitimacy, i.e. the question what makes an authority legitimate.

In what follows I will turn to give a detailed evaluation of four different approaches – consent, beneficial consequences, reasonableness and democratic proceduralism. Note that I will do so by using the example of specific theories and analyzing the plausibility of their argument. As for structure, I will begin in each chapter by giving a brief overview of the theory and then explicate the normative condition defended therein. The main focus of each chapter will be to analyze the plausibility of that normative condition and the arguments put forward to defend them. In the end I shall not only be able to determine the plausibility of each conception, but also to compare them and perhaps find a way to combine them in order to remedy potential weaknesses. The central questions that will guide my research are: What is the most plausible normative condition of legitimate political authority? And: Is there any reason to assume a special role for democracy?

III. JOSEPH RAZ

1. Legitimacy via instrumental justification

In the present chapter I will deal with a conception of legitimate authority as it has been presented by Joseph Raz. The argument will consist of two parts; the explication of Raz' theory and its evaluation. In the end I shall be able to give a balanced account of the merits and holes of Raz' theory.

I proceed by firstly giving an overview of the main points of his theory. On the one hand, this involves an explication of Raz' definition of “authority”, i.e. of how a legitimate authority is different from an illegitimate one, which rules and rights are captured by it, and what obligations it entails. Once I have thus clarified the basic features of legitimate authority, I will turn to flesh out the actual normative conditions that Raz develops in this context: the Normal Justification Thesis and consent. I argue that their normative force draws on the same basis, which is that of “reasons” and their justificatory power. Raz' conception can be classified as an instrumental account of authority, because legitimacy is measured based on the subjects' compliance to reasons.

After this general overview I then evaluate Raz' concept and examine some possible objections against his view. The first question is whether Raz' complex thinking actually presents a consistent account of legitimacy. In this context I take up an idea of Margaret Martin, who argues that Raz fails to give a unified account of authority. Second, I turn to evaluate the plausibility of Raz' normative conditions. For instance leading questions will be:

Is the NJT a convincing account of legitimacy? How is its normativity established? Does it actually ground moral obligation? What can consent add to this view? The third and last evaluation turns to the the scope of Raz' conception of legitimacy, questioning whether it is sufficient to apply this standard only to authorities, but not to their making or qualification.

2. Raz' theses on legitimate authority

2.1 Definition of legitimate authority

Right to rule correlating with political obligation of the subjects

In the first part of his book „The morality of freedom“ Raz defines legitimate authority as „centrally involving a right to rule, where that is understood as correlated with an obligation to obey on the part of those subject to authority“⁵². He thus endorses a rather strong notion of legitimacy which consists in two parts. First, legitimate authority involves a “right to rule”, which can be described as the right to utter directives and to “*require action*”⁵³ from their subjects. It is important that this is not merely understood as a description of power, i.e. as the fact that an authority actually does utter directives or does require action (perhaps even on pain of penalties), but that legitimate authorities have a moral right to do so. This right is complemented by the second aspect of legitimacy, because what distinguishes a legitimate from a mere *de facto* authority is the correlating political obligation. Authority consists not only in a right to rule, or in merely having the power to, rather it requires that the authoritative directives are binding in such a way that subjects are duty-bound to obey⁵⁴.

Regarding this kind of political obligation Raz states that it is “*much more and much less than an obligation to obey the law*”⁵⁵ and that it is not equitable with the more general set of “political duties”. There are two reasons for this. First, the duty to obey law(s) need not

⁵² Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 23

⁵³ Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 38

⁵⁴ Raz, Joseph: The problem of authority: Revisiting the Service Conception., In: Minnesota Law Review, Vol. 90, 2006, p. 1012 – Note that Raz “*argues that all governments claim morally legitimate authority, but not all of them actually possess it*” (Martin, Margaret: Raz' “The Morality of Freedom”: Two models of authority., In: Jurisprudence, Vol. 1, 2010, p. 53).

⁵⁵ Raz, Joseph: The problem of authority: Revisiting the Service Conception., In: Minnesota Law Review, Vol. 90, 2006, p. 1004

depend on whether an authority is legitimate⁵⁶, but could, for instance, result from law's content. While political duties are generally not dependent on the nature of authority, but can have independent normative force, this is not true for the kind of obligation Raz has in mind. For example, even the most illegitimate government might legitimately enact a law against theft and thereby enforce an independently existing moral duty not to take what is not ours. In contrast, a legitimate government might have a claim to their subjects' compliance even if there is no independent moral reason for obeying a certain law, for example regarding tax payment. A second important distinction is that Raz is concerned with the obligation of *subjects*, i.e. the obligation that members of a political community have specifically towards their particular authority and its institutions⁵⁷. In contrast, “political duties” can be understood to be more universal, since they concern political action in general and need not connect to only one particular authority or community. For example, one might have a political duty to fight severely unjust law, but this does not only apply to the legislature in my own state, but also that of foreign countries.

From those clarifications it becomes obvious that the correlation of right and obligation make for the distinct nature of Raz' concept of legitimate authority⁵⁸.

2.2 Normative condition of legitimacy

Instrumental justification: better compliance to reason(s)

For Joseph Raz, the question of legitimate authority arises because of individual freedom. While he rejects the intrinsic value of liberty⁵⁹, he does conclude that it is valuable in staking out grounds for the issue of political authority. The principle of liberty is fundamental to what he calls “political morality”, i.e. the “*morality which governs political action*” and which “*sets a goal as well as limits to the actions of (...) political institutions*”⁶⁰. Authority requires the subjection of one's will to that of another person. However, it is not immediately obvious

⁵⁶ See Raz, Joseph: The problem of authority: Revisiting the Service Conception., In: Minnesota Law Review, Vol. 90, 2006, p. 1004.

⁵⁷ See Raz, Joseph: The problem of authority: Revisiting the Service Conception., In: Minnesota Law Review, Vol. 90, 2006, p. 1004.

⁵⁸ Note that Raz distinguishes between four separate but related issues: “(1) *the authority of the state*; (2) *the scope of its justified power*; (3) *the obligation to support just institutions*; (4) *the obligation to obey the law*”. (See Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 104.)

⁵⁹ See Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 21. Also see chapter I of his book.

⁶⁰ Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 3

how it can ever be a duty to defer one's will and judgment in this way⁶¹. Raz claims that only if an authority is legitimate, its subjects are under a general obligation to comply and follow its directives. This is because political morality requires the authority to protect and promote individual freedom⁶² so that only if certain normative conditions are met, subjection is necessary.

What is the normative condition of legitimacy, then? Raz distinguishes legitimate from mere *de facto* authorities in that he argues legitimate authority is *justified*, while the latter is nothing more than effective power. Thus, the normative condition of legitimacy is “justification”, more specifically moral justification. This distinction is significant, because it suggests that the exercise of authority must be supported by a special sort of reasons. Raz elaborates this by claiming:

*“It is not good enough to say that an authoritative measure is justified because it serves the public interest. If it is binding on individuals it has to be justified by considerations which bind them. Public authority is ultimately based on the moral duty which individuals owe their fellow humans.”*⁶³

Thus, authority is legitimate only if it is morally justified. In turn, moral justification depends on moral duties that individuals have anyway, regardless of their being subject to this particular authority. Raz develops four theses in order to explain the relationship between authority and the “moral duties” that apply to persons.

First, the “Dependence Thesis”, is a normative claim about how a legitimate authority ought to use its power⁶⁴:

*“(…) all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.”*⁶⁵

It is called the “dependence” thesis, because an authority should base its directives on the

⁶¹ See Raz, Joseph: The problem of authority: Revisiting the Service Conception., In: Minnesota Law Review, Vol. 90, 2006, p. 1012.

⁶² See Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 5.

⁶³ Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 72

⁶⁴ See e.g. Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 47.

⁶⁵ Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 47

same reasons that apply to its subjects, hence act on „dependent“ reasons. As Christiano puts it: *“what should guide government decisions about what commands to give subjects is what the subjects already have reason to do”*⁶⁶.

The “Dependence Thesis” is complemented by the “No-difference Thesis”. While the former is a normative claim about how legitimate authorities ought to make their decisions, the latter is a description of the condition that allows us to recognize a legitimate authority:

*“the exercise of authority should make no difference to what its subjects ought to do, for it ought to direct them to do what they ought to do in any event”*⁶⁷

The basic idea is this: If the authority's decisions reflect the subjects' reasons correctly, the exercise of authority will make no difference to what the subjects ought to do – whether one acts based on the applying reasons directly, or whether one follows the law does not make a difference, because both considerations require the same action.

However, Raz' „Normal Justification Thesis“ assumes that in case of a legitimate authority the subject *„is likely to better comply with reasons which apply to him (...) if he accepts the directives of the alleged authority“*⁶⁸. Chances are that if we deliberate on the reasons by ourselves we might get it wrong. This might still happen if we rely on the authority to tell us what to do, but if the authority is generally more likely to get it right, then this authority is legitimate in exercising its power; it has a right to rule: *“An authority does its job well and is therefore legitimate when it enables subjects to act better on the reasons that apply to them when they take the commands as giving them preemptive reasons.”*⁶⁹

This then gives way to the “Pre-emptive Thesis”, which asserts that in the case of legitimate authorities, decisions do not merely act as an additional reason for subjects to behave in a certain way, but rather they pre-empt, basically replace, the reasons that were to be considered by the subjects:

⁶⁶ Christiano, Tom: Authority., In: Stanford Encyclopedia of Philosophy, first published 2004 (to be found online at: <http://plato.stanford.edu/entries/authority/>, last visited on 6 March 2011, 16:51)

⁶⁷ Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 48

⁶⁸ Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 47

⁶⁹ Christiano, Tom: Authority., In: Stanford Encyclopedia of Philosophy, first published 2004 (to be found online at: <http://plato.stanford.edu/entries/authority/>, last visited on 6 March 2011, 16:51)

*“the fact that an authority requires performance of an action is reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.”*⁷⁰

Authoritative directives justifiably preempt what Raz calls “background reasons”, because in issuing its directives the authority has considered them anyway⁷¹. Thus, an authority preempts the subjects' reasons, but at the same time it is bound by them itself.

Putting those four theses together, we get the picture that authority is legitimate, (i.e. justified), if it is likely to lead to better outcomes (i.e. better compliance to applying reasons)⁷². In turn, if it is legitimate, its directives are pre-emptive reasons for action, i.e. sufficient and beyond the need of any further justification. This is the core of Raz' „service conception“ (SC) of authority and meant to answer the moral question of *“how it can ever be that one has a duty to object one's will and judgment to those of another”*⁷³. It is based on a form of instrumental justification, because in Raz' argument it is not for (a) reason itself, that authority is justified, but because it will lead to better compliance to reason(s). The directives of a legitimate authority create obligation, regardless of their particular content, because they depend on reasons that apply to the subjects anyway. Furthermore, Christiano points out that the cogency of Raz' theory depends on the thought that *“as long as the subject does better by reason overall by obeying certain classes of commands, the subject has a duty to obey every one of the commands: the correct as well as the incorrect.”*⁷⁴ This is important, because it underlines why the difference between the broad but content-dependent set of political duties and the obligation stemming from legitimacy is so significant to Raz' thinking.

2.3 Additional normative condition of legitimacy

Consent to reasonably just authorities

As we have seen, Raz offers an instrumental justification of authority, arguing that legitimacy

⁷⁰ Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 46

⁷¹ See Raz, Joseph: The problem of authority: Revisiting the Service Conception., In: Minnesota Law Review, Vol. 90, 2006, p. 1019.

⁷² See Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 61.

⁷³ Raz, Joseph: The problem of authority: Revisiting the Service Conception., In: Minnesota Law Review, Vol. 90, 2006, p. 1012

⁷⁴ Christiano, Tom: Authority., In: Stanford Encyclopedia of Philosophy, first published 2004 (to be found online at: <http://plato.stanford.edu/entries/authority/>, last visited on 6 March 2011, 16:51)

stems from correctly reflecting the subjects' reasons and enabling them to better comply with those reasons if they treat authoritative demands as pre-emptive and binding. For Raz it follows that one „has a duty to uphold and support authorities if they meet the conditions of the service conception“⁷⁵. It would seem that the scope of this duty for a particular individual depends on the extent to which the SC is met for him/her personally: The more one's compliance with the authority's directives is likely to lead to better compliance with one's applying reasons, the greater the duty owed to that particular authority. As Raz puts it: „The government may have (...) more authority over one person than over another.“⁷⁶ This grants a certain flexibility, because the actual scope of obligation depends on the individual's capacity to conform with the applying reasons⁷⁷.

However, what adds to the complexity of this case is that Raz demands that we are not only to consider how our subjection to authority helps our own compliance with reasons, but also how it affects the compliance of our fellow human beings. Hence, if it serves the „public interest“, our subjection to authority may be required even if it doesn't improve our own compliance, or if it demands certain sacrifices. The reason for this is itself a normative reason applying to us: We have a moral duty towards our fellow human beings⁷⁸. Since the actual authority over a particular individual depends on individual capacities on the one hand, but also on „its legitimate authority over the population at large“⁷⁹, government's authority is „legitimate to various degrees regarding different people“⁸⁰. Raz suggests that the scope of any current government's authority cannot be legitimate, because it is both too wide (covering areas not included through the SC at all) and not flexible enough (claiming authority over all individuals to more or less the same degree)⁸¹. The fundamental question therefore is whether the scope allowed for by the SC can be widened, whether there is a supplement for the NJT.

Raz claims that this is indeed possible: Consent as well as an attitude showing similar features (e.g. acceptance of the obligations introduced by the law) may legitimize authority beyond the

⁷⁵ See e.g. Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 66 – Note: He contrasts the scope of this duty with the „duty of supporting and upholding just institutions“. Those duties are wider because just institutions do not necessarily have authority over the subject, therefore they are primarily „other regarding“ (p. 67) In general, there seems to be some ambiguity regarding the term „just“, but in this context I take it that „legitimate“ and „just“ are used interchangeably.

⁷⁶ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 74

⁷⁷ See e.g. Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 73.

⁷⁸ See Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 72.

⁷⁹ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 74

⁸⁰ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 104

⁸¹ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, pp. 77-80

ground covered by the SC⁸²: “*consent does extend the bounds of authority beyond what can be established without it*”⁸³. However, this supplementary condition holds only for reasonably just authorities, because it is the intrinsic value of consent/attitude, possible solely under the condition of reasonably just authorities, which validates its effect⁸⁴: “*It is binding only if there are good reasons to enable people to subject themselves to political authority by their consent.*”⁸⁵ Thus, only if there is reason for our consent to bind us, i.e. if there is consent-independent reason to subject oneself to an authority, consent creates obligation. Since unjust governments would not give us any moral reason to subject ourselves to them, even consenting to being their subject will not solve the problem – even if our consent is given freely and would be considered “valid” consent, it does not bind us.

It is important to acknowledge that “reasonable justice” is not itself enough to legitimize authority, instead it is only our consent or attitude towards it which has this result. Furthermore consent can only widen the scope of authority, but it cannot itself establish legitimacy, because it is binding only if certain background conditions render it permissible for it to be binding: “*consent can only be held binding if it is so qualified that its effect is almost entirely confined to reinforcing independently existing obligations to obey*”⁸⁶ and “*it cannot be used as a way of endowing anyone with authority where that person had none*”⁸⁷. However, if all those conditions are met, consenting to a government's authority, or accepting their authority as binding, creates an obligation similar to that established by the NJT, because it makes us duty-bound to obey and treat authoritative utterances as pre-emptive reasons for action. It is nevertheless a qualified obligation, because it depends on the subject having consented and does not stem directly from the government's performance the way it does in case of “standard legitimacy obligation”.

⁸² See Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 100.

⁸³ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 93

⁸⁴ See Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 92.

⁸⁵ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 89

⁸⁶ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 90

⁸⁷ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 90

3. Evaluation

3.1 Incompatible models of authority

Joseph Raz' service conception of authority consists of four theses which are very different in their aim and structure. The Dependence Thesis (DT), for example, is a normative claim about how authorities ought to make their decisions, while the Normal Justification Thesis (NJT) defines the normative condition of legitimacy via the instrumental value of an authority's rule. The Pre-emptive Thesis (PT), on the other hand, describes the nature of political obligation stemming from legitimacy. Last, the No-difference Thesis (NDT) describes the condition which allows us to recognize a legitimate authority. When assessing Raz' theory the first important question is whether it actually represents a consistent model of authority or whether the complex combination of his theses leads to analytical conflicts.

In fact, this is the very argument Margaret Martin has made in her article “Raz' *The Morality of Freedom*: Two models of authority.”⁸⁸. She asserts that Raz only *claims* to present a unified model of authority, when actually he proposes two essentially incompatible conceptions⁸⁹. She suggests that the Normal Justification Thesis is a moral argument, while the Dependence Thesis represents a form of positivist thinking. In her view this means that those two are antagonistic and cannot be used to complement each other, consequently suggesting that one has to be prioritized over the other. In the following I aim to assess this claim.

Raz' Normal Justification Thesis states that

*“the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.”*⁹⁰

⁸⁸ See Jurisprudence, Vol. 1, 2010.

⁸⁹ See Martin, Margaret: Raz's *The Morality of Freedom*: Two models of authority., In: Jurisprudence, Vol. 1, 2010, p. 72.

⁹⁰ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 53

According to Martin this makes the bindingness of norms a moral matter and content-dependent in the sense “*only morally legitimate legal norms have pre-emptive force*”⁹¹. This invites case-by-case assessment⁹², because it seems that subjects are only bound by those directives that actually improve their compliance to reason(s). Hence one ought to determine the validity of any authority's decision before obeying it.

In contrast, the Pre-emptive Thesis claims that legal norms are exclusionary reasons for action and pre-empt any other considerations:

*“the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.”*⁹³

This is to say that when confronted with an authoritative rule, subjects are not allowed to go back to the original, or “background”, reasons for action, i.e. the reasons that apply to them directly, but they must act based on the rule itself. This is because the rule already reflects all relevant applying reasons, hence “pre-empting” any force they might have had for the individual subject.

This then seems to create a conflict, because “*the very act of determining whether the norm meets the normal justification standard undermines the pre-emptive force of the norm in question*”⁹⁴. Either the bindingness of norms depends on their content and instrumental moral value, or any directive uttered by an authority requires pre-emptive commitment independent of their particular content. This problem is intensified when keeping in mind that Raz “*rejects the claim that we have a general obligation to obey the law*”⁹⁵ even in a relatively just society. It stands to question whether there is a way to circumvent this dilemma and, if not, whether and to what extent that would matter.

One way of trying to reconcile the NJT and the PT could consist in simply *presuming* that an

⁹¹ Martin, Margaret: Raz's *The Morality of Freedom*: Two models of authority., In: *Jurisprudence*, Vol. 1, 2010, p. 58 (Also see p. 61.)

⁹² See Martin, Margaret: Raz's *The Morality of Freedom*: Two models of authority., In: *Jurisprudence*, Vol. 1, 2010, p. 57.

⁹³ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 46

⁹⁴ Martin, Margaret: Raz's *The Morality of Freedom*: Two models of authority., In: *Jurisprudence*, Vol. 1, 2010, p. 58

⁹⁵ Martin, Margaret: Raz's *The Morality of Freedom*: Two models of authority., In: *Jurisprudence*, Vol. 1, 2010, p. 72

authority is competent and usually fulfills the requirements of the NJT. One does better complying with one's reasons if one generally defers one's judgment to that authority (as proposed in the pre-emptive thesis), then, because “(...) *authority has it right or, at the very least, is more likely to have it right than I am.*”⁹⁶ In that case one would be able to pre-commit oneself to the rule of authority, simply presupposing – without questioning – that it does live up to the NJT. If it actually does, both conditions would be fulfilled. Yet there is an obvious problem with this approach: Without a solid argument for why and under what conditions a particular authority can be held to actually be in line with the NJT – empirically, universally and perpetually – this argument is not convincing. First, what kind of evidence would enable a person to reasonably “presuppose” a government's legitimacy along the lines of the NJT? How often would it have to be renewed? The problem is posed by the fact that it is not at all obvious how one should, or could, decide when and under what conditions the NJT is generally satisfied⁹⁷. As Martin points out: “*who gets to decide whether a given norm meets the requirements of this thesis?*”⁹⁸. There might be good reason to believe that there is, and always will be, reasonable disagreement about what “reason” requires us to do⁹⁹. Second, and even more important, it stands to question whether there would be any substance left to the NJT if it is reduced to a mere presupposition. Legitimacy would then be a “claim-feature” of authority, i.e. exactly what Raz has been trying to deny¹⁰⁰.

An alternative resort for trying to escape the dilemma posed by the conflict between the NJT and the PT could consist in the argument that a case-by-case assessment of authoritative directives is unnecessary since they are pre-emptive not only if and when they satisfy the NJT, but also due to other moral reasons. For example Martin suggests: “*The law allows a large number of people to co-exist peacefully. Because law coordinates our behavior on a large scale, and in so doing we reap many benefits, we therefore have an obligation to obey it (...)*”¹⁰¹ This would indeed be a an instrumental justification for authority that is quite similar to that of Raz, but it would impose much less demanding moral requirements on authority. In

⁹⁶ Martin, Margaret: Raz's *The Morality of Freedom*: Two models of authority., In: Jurisprudence, Vol. 1, 2010, p. 64

⁹⁷ See Martin, Margaret: Raz's *The Morality of Freedom*: Two models of authority., In: Jurisprudence, Vol. 1, 2010, pp. 67-68.

⁹⁸ See Martin, Margaret: Raz's *The Morality of Freedom*: Two models of authority., In: Jurisprudence, Vol. 1, 2010, pp. 67-68.

⁹⁹ See the following chapter on Rawls.

¹⁰⁰ See Raz, Joseph: The problem of authority: Revisiting the Service Conception., In: Minnesota Law Review, Vol. 90, 2006, p. 1005.

¹⁰¹ Martin, Margaret: Raz's *The Morality of Freedom*: Two models of authority., In: Jurisprudence, Vol. 1, 2010, p. 72

fact, rule of law (legality) would be sufficient to create obligation – an assertion that Raz rejects when he argues we have no general obligation to obey the law, even in a relatively just society¹⁰².

I conclude that Martin is right in pointing out the conflict between the NJT and the PT, because they do seem to exclude each other, at least if we accept that they are both “absolutes”. But where does that leave us?

I suggest that Martin's observation is important, because it calls attention to some weak spots in Raz' theses. The problem is not only that the combination of his theses is not fully consistent, but rather that each for themselves would not be fully convincing either. The NJT is the normative framework of legitimacy because it defines its conditions – authoritative directives are legitimate if they improve our compliance to reasons. Even if this makes for morally sound judgment, though, it invites a case-by-case assessment which is simply not practicable in complex modern societies. In contrast, the PT offers a solution for practicable authoritative rule, but at the price of moral requirements – which is to say that an authority is likely to rule effectively if its subjects treat their directives as pre-emptive reasons for actions without questioning them, but if the only reason they do that is the authority's power, this is probably not the most plausible explication of the normative notion of legitimacy, . If the authority's decision pre-empts our own process of justification in any case, we risk actually being morally worse off by complying with it, at least if should there be cases where our own judgment would lead to better compliance to reasons. Thus one might conclude that neither thesis would be sufficient to stand as an adequate concept of legitimate authority, because it would be either at the cost of practicability or morality. However, their combination is not fully convincing either, because they cannot be seen to balance but rather to annihilate each other.

3.2 The Normal Justification Thesis

In the previous section I have argued that Raz' concept of legitimacy is not fully convincing, because I find that the combination of his NJT and the PT leads to inconsistency. I also

¹⁰² See Martin, Margaret: Raz's *The Morality of Freedom*: Two models of authority., In: Jurisprudence, Vol. 1, 2010, p. 71 and Raz, Joseph: *The Morality of freedom*, Oxford, 1988, e.g. p. 67.

pointed out that without the PT, the NJT would not be workable since it requires the subjects to develop their own moral judgment in a way that defeats the purpose of efficient rule. Apart from this practical problem, though, one could also question the *normative* force of the NJT. Raz suggests that an authority's legitimacy depends on whether our subjection makes us better comply with morally relevant reasons, i.e. reasons which apply to us independent of the authority's rule. The question is whether this account is actually persuasive, or put differently, whether justification via reasons is the appropriate normative condition of legitimacy.

Raz argues that “reasons” are essential for legitimacy, because authority needs to be *justified* in order to be legitimate, and the normal way of justifying authority is to argue that we better comply with reasons that apply to us if we treat the authority's directives as pre-emptive reasons for action. In short, reasons are important because they (can) justify an authority. They apply to us, but they indirectly also apply to the authority. Only if an authority reflects our reasons correctly it has a right to rule, which then entails that we follow its directives and treat them, instead of the original reasons, as our primary reasons for action. There are two obvious questions regarding this summary, one analytical and one substantive. First, what are those reasons and how do they apply to us? Second, does it actually make sense to assume that those reasons can justify an authority; justify us being subjected to someone else's will?

On an analytical level, Raz introduces four distinctions. First, he distinguishes between *normative* and *explanatory* reasons. Normative reasons count in favor of an action, make its choice intelligible¹⁰³, while explanatory reasons merely explain “*how or why*” things are¹⁰⁴. Within the context of legitimacy, he is concerned with normative reasons, which means that we are dealing with reasons that make claims on us.

Second, he continues to distinguish between *action* and *outcome* reasons. In the first case, the value lies in the “*performance*” of an action¹⁰⁵, but in the latter it lies in its outcome or consequence¹⁰⁶. Put differently, we could explicate this to mean that the claim is either for us to perform a certain act or it is for us to bring about a certain outcome. Either way the following action might be the same, yet its justification is not, because it either lies in the

¹⁰³ See Raz, Joseph: The problem of authority: Revisiting the Service Conception., In: Minnesota Law Review, Vol. 90, 2006, p. 1006.

¹⁰⁴ Raz, Joseph: The problem of authority: Revisiting the Service Conception., In: Minnesota Law Review, Vol. 90, 2006, p. 1006

¹⁰⁵ Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 279

¹⁰⁶ Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 279

action itself or in its consequences. This is important also because it might be relevant for whether or not a person has to perform the required action him-/herself.

Third, Raz' distinguishes between *agent-relative* and *agent-neutral* reasons. Agent-relative reasons are "*reasons for some people and not for others*"¹⁰⁷, their claims do not apply to all of us but only to some people in virtue of some significant feature. Agent-neutral reasons are reasons "*for everyone*"¹⁰⁸, which I take to mean that they apply to all of us, in virtue of some common feature, most likely our common humanity. They do not discriminate between humans based on personal features, but rather they make claims on anybody and in just the same way.

Note that the above discrimination has its focus on the agent, while Raz' last argues that we can also distinguish between reasons based on the origin of their normative force. As a matter of fact he argues that some reasons are *content-dependent* while others are not, and he takes this to mean that sometimes there is "*no direct connection between the reason and the action for which it is a reason*"¹⁰⁹. For example, a credible threat might be a viable reason to do (almost) anything, regardless of what particular action is required. In that sense, a person holding a gun to my head and threatening to shoot me will give me a reason to do what he wants me to do – be it lie to a police officer, pay them money or order pizza. The primary reason for performing any of those actions would not lie in their content, but rather in the specific circumstances.¹¹⁰ As Scott Hershovitz has summarized, content-independent reasons are "*facts that achieve their status as reasons in virtue of features other than their content*"¹¹¹. Note that content-independent reasons are similar to what Raz calls "pre-emptive" reasons, because in that case too, the *nature* of the reason, rather than the required action, is what makes the normative claim on us.

Taking stock of those clarifications we can conclude that Raz tells us quite a lot about the nature and variety of reasons. However, the question remains how they actually relate to us, or, put differently, what they *mean*. What claims to reasons make on us? Here, I suggest, Raz remains disappointingly vague. The only real clue he gives us is when he mentions that

¹⁰⁷ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 314

¹⁰⁸ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 146

¹⁰⁹ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 35

¹¹⁰ Needless to say that of course the actions following from a threat differ in regards to their own moral worth, and thus threat might be a more or less valid reason to actually perform them.

¹¹¹ Hershovitz, Scott: *Legitimacy, democracy and Razian authority.*, In: *Legal Theory*, Vol. 9, 2003, p. 203

“moral duties” toward others are “reasons” in the context of authority. For example he writes: *“It is not good enough to say that an authoritative measure is justified because it serves the public interest. If it is binding on individuals it has to be justified by considerations which bind them. Public authority is ultimately based on the moral duty which individuals owe their fellow humans.”*¹¹² This implies that authority is legitimate if it makes us better realize our moral duties towards our fellow human beings. Moral duties are usually based on rights¹¹³, but there are also some “*intrinsic duties*” that do not derive from rights¹¹⁴. On some occasions he suggests that moral duties are not the only reasons, but he provides no further explications, either regarding the sort of claims they make on us, or what source they trace back to.

This, I suggest, is problematic, because it seems the normative force of the NJT depends on the sort of reason Raz has in mind. For his argument would appear to go:

A. Freedom matters.

B. Reasons matter.

B1: Compliance to reasons matters.

C. If authority improves our compliance to reasons, it is legitimate (even if it limits our individual freedom).

What bothers me is that if both reasons and freedom are important it does not seem sensible that all reasons matter equally. Moral duties toward other humans seem a straight-forward case of reasons that we are ought to comply to, but how about other sorts of reasons? Most people agree that rain provides me with a reason to take an umbrella when I leave the house. The question is whether this reason really is morally fundamental enough as to justify an authority enforcing it as a rule, thus limiting my personal freedom. I believe that Raz did not mean to say that, however, I deem it a serious weakness of his argument that he does not take the time to clarify what kind of reasons his NJT refers to. The NJT's normative force depends on the normative force of reasons, but while all reasons might have some normative force, there still are crucial differences in the scope of their normativity, and this makes it necessary to clarify which reasons are fundamental enough to justify a limitation of freedom.

That said, the fundamental question remains whether Raz is successful in defending

¹¹² Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 72

¹¹³ See Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 183.

¹¹⁴ See Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 210.

“justification” as normative condition of legitimacy. I personally am not sure that he is. On the one hand, I do find his idea that justification – more particularly: justification based on morally relevant reasons – is what legitimizes authority, intriguing. It makes sense that in order for a directive to be legitimate, there must be “good reasons” for it and on an intuitive level I thus agree that “reasons” are normatively basic. Reasons justify, and what is justified by reason(s) can count as legitimate. However, while I believe that Raz is successful in *describing* justification as the condition of legitimacy, I think he is too vague when it comes to making the actual argument. He seems to assume that it is obvious, beyond dispute, what reasons there are; that “the” reasons are just “there” and apply to us, so that we can have a good estimation of whether or not we are conforming with them (and, consequently, whether we comply better by following one course of action or another). However, simply “presupposing” reasons and our knowledge of them is oversimplifying the matter at hand, and this, in my estimation, undermines the persuasiveness of the NJT.

I conclude that the NJT provides an appealing condition of legitimacy, because it acknowledges the normative force of reasons. However, Raz' conception of reasons and their relation to the justification of authority seems underdeveloped to me: It suggests that there is one thing we have to know in order to determine whether an authority is legitimate or not: our applying reasons and how we best comply to them (either subjecting to the authority's rule or not). Yet it remains unclear to me what the appropriate answer to this question is, or how one might discover.

Perhaps this weakness could be remedied if we change our view on the relation between reasons and justification. On Raz' account of “justification” authority is legitimate not because it complies to reasons, but because it makes *us* better comply to reasons. This makes it appear as if reasons are not directly relevant for the justification of authority, because they do not justify its actions directly, but merely ground them in the sense that authority ought to “*consider*” them. The actual *justification*, and thus legitimacy, depends on the subjects, not the authority, because it stems from the subject's compliance to reasons. Justification is therefore a *state*, one defined through the realization of reasons on part of the individuals. I believe an alternative view could be more successful in defending “justification” as relevant normative condition of legitimacy. This is because one could argue (along the lines of Christine Korsgaard and Fabienne Peter, for example), that reasons are not just “there”, applying to us like raindrops fall on us. Rather, they are arguments that we use in the *process*

of justification, i.e. the process of justifying things to one another. What matters, for legitimacy, then, is not some objective over-all compliance score, but rather a specific way of an authority relating to its subjects. Justification would not depend on the substance of reasons so much, but focus on the conditions that make them have normative force on us. This in turn suggests that we need a certain conception of practical reason in order to get a grip on the normativity of reasons.¹¹⁵

3.3 Consent

As we have seen, the NJT forms the core of Raz' conception of legitimate authority. It is the basic standard of justification, the normative condition of legitimacy. However, Raz introduces a second standard that might be seen to supplement the NJT: consent. As he puts it: "*consent does extend the bounds of authority beyond what can be established without it*"¹¹⁶. This suggests consent is a normative supplement to the NJT, because it can render authority legitimate even where the NJT does not hold for every individual who is subject to the authority.

For me this gives rise to two questions: First, what does the normative force of consent consist in? And second, how does it fit in the broader framework of Raz' theory? Is it consistent with the NJT; does it succeed in adding moral justification?

Regarding the normative force of consent, Raz argues that "*consent can only be held binding if it is so qualified that its effect is almost entirely confined to reinforcing independently existing obligations to obey*"¹¹⁷. What he means is that consenting to being subject to an authority creates an obligation similar to that of the NJT only if there is good reason for this consent to bind us. Free consent to a severely unjust authority does not put us under any obligation, then, because this obligation would not be justified by moral reasons. If, on the other hand, an authority implements reasonably just law, and we consent to being subjected to it, this binds us, because there are independent moral duties that are thus enforced. While the NJT refers to an improvement in our compliance to reasons, the normative condition of

¹¹⁵ For detailed evaluation of this view see the following chapter on Peter.

¹¹⁶ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 93

¹¹⁷ Raz, Joseph: *The Morality of freedom*, Oxford, 1988, p. 90

consent does not require that we become *better*, only that the rule itself is supported by good reasons. It is therefore less demanding, but also less powerful than the NJT, because the actual obligation is grounded in independent moral duties – in “reasons” – more than it is grounded in actual consent. The authority's right to rule is *reinforced*, not established, by our consent. That is to say legitimacy still depends on the fulfillment of the NJT, and consent merely widens the legitimate scope of the authority's rule regarding my own person. Note that consent or its withholding can, in Raz' view, never *reduce* the legitimate scope of an authority's rule, rather it can only be used as a means of its extension. This could be explicated as follows:

A. By consenting to the rule of an authority which does not live up to the NJT I do not create any obligation for myself.

B. By consenting to the rule of an authority which does live up to the NJT I only create “new”, or additional, obligation for myself regarding what is beyond the scope covered by the NJT but can still be deemed “reasonably just”.

C. I cannot reduce my obligation by not consenting to the rule of an authority which lives up to the NJT and which is reasonably just even beyond that .

If those explications are fairly accurate, it seems that consent, while introduced as a normative condition in its own right, does not actually add much normative insight into legitimate rule: What is justified by the NJT is legitimate and puts me under obligation, regardless of whether or not I decide to give my consent. Regarding directives that go beyond the scope of the NJT, my consent can add to obligation, but only if those directives are “reasonably just”. Again, consent does not create this obligation, but only reinforces it. By definition it seems that “reasonably just” directives are utterances that do not live up to the NJT because they do not *improve* our compliance to reasons, but which are still justified by exactly those independent moral reasons which I need to comply with. If that is true, though, I am not sure what normative force is actually added through consent. Perhaps our recognition of a duty ought to make our compliance more likely, but what more is consent supposed to do, supposed to be, than this recognition of duty, if what we are then bound by binds us anyway?

I conclude that Raz argument for the bindingness of consent is insightful and dissatisfying at

the same time. On the one hand his argument that consent can only bind us where “*there is a reason for such consent to bind us*”¹¹⁸ bears an important truth. At the same time, however, this statement also seems to imply that consent never really *changes* our normative situation, it is only an explication, an acknowledgment of it. That is to say: Consent may be significant for a subject's relation to an authority for all sorts of reasons; for example because it represents an individual *endorsement* of reasons. Yet it does not directly establish (or invalidate, for that matter) normativity.. But how, then, can it be a (separate) normative condition of legitimacy? Raz' description of consent leads us back to the realization of why reasons are normatively basic, and in which way they are. I even believe that his argumentation in the context of consent makes this much more evident than his conception of the NJT does, but that does not make “consent” a convincing standard for legitimacy. However, this does not establish a direct link to legitimacy. Moral obligation stems from reasons, because they make normative claims on us, that much becomes evident from Raz' work. Yet, what I have come to conclude is that neither the NJT nor consent are convincing conceptions of how this relates to legitimate authority.

4. Conclusion

This chapter has provided an overview of Raz' conception of legitimate authority. For him it entails a right to rule as well as a correlating obligation to obey. He thus proposes two normative conditions, the more important of which is the Normal Justification Thesis (NJT). I have argued that Raz' service conception is an instrumental account, because it suggests that authority influences our compliance to reasons and legitimacy depends on whether we comply better or worse when subjecting to the authority's rule. The NJT is supplemented by a second normative condition; consent. It can render an authority's rule legitimate beyond the scope of the NJT, but only if it is at least reasonably just. The obligation that arises from the NJT and consent depends on the same normative basis, that is, reasons. An authority is legitimate if it is justified, and this justification depends on moral reasons which exist independent of the rule and which oblige the individual. Throughout my evaluation of Raz' view, I found that this is actually the most promising aspect of his theory. However, I raised various concerns regarding the plausibility of how Raz incorporates it into the NJT and his defense of consent as a legitimizing condition. It seemed to me that he sometimes presupposes what should be

¹¹⁸ Raz, Joseph: The problem of authority: Revisiting the Service Conception., In: Minnesota Law Review, Vol. 90, 2006, p. 1039

justified. For example I argued that the relation of reasons, justification and legitimacy requires some clarification, or limitation, of what the relevant reasons are, otherwise it remains too abstract what legitimacy actually means. All in all I am not convinced that the normative force of reasons is best explicated when making individual compliance the relevant measure and I therefore suggest that a different incorporation might be more successful.

IV. JOHN SIMMONS

1. Legitimacy via consent

In the present chapter I deal with the conception of legitimate authority developed by John Simmons in his famous article “Justification and legitimacy”¹¹⁹. The argument will consist of two parts; the explication of Simmons' theory and its evaluation. In the end I shall be able judge the plausibility of his view.

In order to give an overview of Simmons' thought, I will first clarify the notion of authority that he relies upon in his paper. In particular this requires me to explicate his distinction between “justified” and “legitimate” authorities and the implication this has for the moral rights and duties involved. In the following section I then specify the normative condition he defines regarding legitimacy and how it is distinct from other moral considerations. As we will see, Simmons draws on a Lockean conception of natural freedom in order to confirm “consent” as the legitimizing condition for authorities. This means that his theory neither refers to instrumental nor intrinsic arguments, i.e. he neither uses arguments of the form “A is legitimate if it leads to X” or “A is legitimate qua being a”. Instead his notion of legitimacy depends on the subjects' free deferral of the right to rule. Put differently: For Simmons legitimacy does not demand that a specific sort of consequence follows from an authority's command, or that certain principles are realized, but it requires actual transactions between the two parties involved (the authority and its subjects).

¹¹⁹ See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999.

In the second part of the present chapter I evaluate Simmons' claim that consent is a necessary and indeed the only normative condition of legitimacy. First, I assess his thesis that consent is necessary due to the natural freedom of persons. I conclude that the assumption of freedom is plausible, but that the specific version of Simmons' argument is not. That is to say: It is plausible to assume that persons are free and equal, not naturally under a certain political rule. What is not plausible, though, is that Simmons therefrom deduces that the only thing that can ever bind us despite our freedom is what we consent to. This is why the concept freedom is plausible, but in my view the conceptions of Simmons is not. Second, I explicate the “particularity requirement”, which demands that obligation has to be established in regards to particular individuals in order to be binding. I concede that this is significant, but still deny that consent is necessary. Third, I then turn to the core of Simmons' theory, i.e. the idea that “justification” and “legitimacy” are distinct concepts which require distinct normative conditions. In fact, I agree with the first part of his claim, but not the second one. Instead I argue that the two normative conditions should cohere. Last, I assess the validity of Simmons' claim that legitimacy requires consent because it is the best way to accord for the motivation of subjects, concluding that I do not find this assumption convincing.

2. Simmons' theses on legitimate authority

2.1 Definition of legitimate authority

Right to rule includes infliction of duties and use of coercive force

In his article “Justification and Legitimacy” Simmons argues for a distinction between *justification* and *legitimacy* in regards to the vindication of political authority. He suggests that even if an authority is justified in being an authority or in exercising its power, this is not sufficient to actually legitimize it. That is important because only a legitimate government/state has „*the complex moral right (...) to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties*“¹²⁰. What sets legitimate authorities apart is thus the „*logical correlate*“¹²¹ of a right to rule with the (moral) duty to obey. Legitimate authority for him signifies a

¹²⁰ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 746

¹²¹ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 746

morally significant relation between the state/government and its subjects¹²². This means that there is more to this relation than that the state provides a “*stable and lawful*”¹²³ environment for its citizens, because it both imposes and enforces duties; duties which the subjects have specifically towards their particular government. To be under a legitimate authority's rule hence means for an individual to be subjected to its directives, law, and, arguably, their coercion.

Two things are of special significance in this context. First, Simmons does not only distinguish between mere authorities and “*legitimate* authorities”, as for example Joseph Raz does¹²⁴. Instead, he emphasizes that legitimacy is a distinct normative concept which must not be confused with other moral ascriptions such as justification or justice. This is important, because just as Raz argues that mere *de facto* authorities do not infuse obligation on the part of their subjects, Simmons suggests that even if the normative condition of justification holds, obligation is not yet established. This can be contrasted with the view of John Rawls, who is not so much concerned with the difference between authorities that do impose duties and those that do not, but who focuses on the difference between “justice” and “legitimacy”, both of which are normative concepts and both of which create obligation, but of a different scope¹²⁵. That leads to a second important clarification: Simmons might have a rather conservative view of what “legitimacy” means – a right to rule correlated with a duty to obey – but his theory is nevertheless important, because he defends a very different normative condition than either Raz or Rawls do.

2.2 Normative condition of legitimacy

Deferral based on freedom of persons

As we have seen, Simmons' main claim regarding legitimacy is that any political authority has to pass a two stage challenge when it comes to the normative question: First its mere existence has to be *justified*, but a second step is necessary to *legitimize* the actual authority over a particular individual. On this view, the main assumption is that justification is not the normative condition of legitimacy, but instead a separate concept altogether. It is not a rival of

¹²² See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 746.

¹²³ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 748

¹²⁴ See the preceding chapter on Raz for details.

¹²⁵ See the following chapter on Rawls for details..

legitimacy, though, but better understood as its pre-condition. This means that justification and legitimacy are moral concepts that draw on distinct normative conditions¹²⁶. In the following I will clarify how Simmons distinguishes between the two concepts and give an account of his argumentation.

Regarding normative conditions Simmons argues that while “justification” can be accomplished by pointing to the rational desirability or moral virtues of governments/states in general, legitimacy requires the free consent of particular individuals towards particular governments/states¹²⁷. An authority is justified, for example, if it has a tendency to produce good outcomes or consequences¹²⁸, if it is “*on balance*” a good thing to have¹²⁹. However: “*The fact that a state (...) has virtues that can be appealed to in order to justify its existence cannot itself argue for its having special rights over any particular individuals.*”¹³⁰ Simmons offers the analogy of a useful business in order to prove this point. He argues that a “good”, business does not, as a result of its general qualities, have the right to have particularly me as a client¹³¹. For example, even if we can prove that Amnesty International is a morally good or useful business, this fact is not sufficient to legitimize the use of coercion to make me join its ranks. Similarly, the existence of window-washing companies might be justified by a variety of valid reasons and yet this does not put me under any obligation to hire them. Just because an authority is “a good thing to have” does not mean that I am obligated to be their subject¹³².

In making his argument Simmons does not rely on intuition alone, but he bases his view on a Lockean approach that relies, for its foundation, on the „*natural freedom*“¹³³ of persons. In Simmons' view, an individual's natural freedom renders it impermissible for anyone to claim authority over them unless it is freely granted through consent. This is because humans are born free and equal and under no-one's authority. Hence it requires free deferral to put me under someone's rule and to establish obligation towards that authority, because “*I am constrained only by how I have in fact lived and chosen*”¹³⁴ and not by how I might have reason to choose.

¹²⁶ See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 739.

¹²⁷ See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 745.

¹²⁸ See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 743.

¹²⁹ See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 755.

¹³⁰ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 752

¹³¹ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 752

¹³² See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 742.

¹³³ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 754

¹³⁴ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 762

What this means is that justification is a general concept whose normative condition can be established abstractly, by giving reasons. An authority is justified if it can be shown to be rationally desirable, but this does not need to relate to any specific person or context; general virtues will suffice. Legitimacy, on the other hand, is *particular* in the sense that it stands for a special moral relation between a particular authority and its particular subjects. This particularity in turn requires for the relation to be an *actual* one, and not merely hypothetical; it is about an actual authority and its actual subjects. No state or government can have legitimate authority over an individual unless this sort of relation is established. Since I am born free and under no-one's obligation, there is no way for me to be put under their rule unless I make this transaction myself: *"The legitimacy of particular states thus turns on consent, on the actual history of that state's relations with its subjects."*¹³⁵ The normative condition of legitimacy therefore depends on the actual consent of particular individuals. This means that an authority may be justified regarding all of its subjects (and perhaps even beyond that) without ever having a legitimate right to rule any one of them – if none of them consents to being subjected to their rule, that is: *"Political power is morally legitimate, and those subject to it are morally obligated to obey, only where the subjects have freely consented to the exercise of such power and only where that power continues within the terms of the consent given."*¹³⁶

In presenting his theory of legitimacy, Simmons explicitly rejects Kantian notions of legitimacy and in particular the Rawlsian conception. He actually objects that their theories entail an impermissible „*conflation of questions about justification and legitimacy*“¹³⁷. According to him, Rawls fails to establish legitimacy, because actual consent is neglected in favour of some version of “hypothetical consent”. That is to say, in his conception of legitimacy, Rawls appeals to what people *would* endorse were they in a certain state of mind¹³⁸ and therefrom develops his normative conditions. However, in Simmons' view this approach is flawed. It is not sufficient to establish legitimacy, because all it might go to show is whether an authority is “desirable”. Rational desirability is an issue of justification, though, not of legitimacy, because it does not account for the freedom of persons (i.e. for the fact that we are under no authority unless we have freely consented to it). As he puts it: *"If the*

¹³⁵ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 745

¹³⁶ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 745 – Also see p. 746 for comments on the possibility of “partial” legitimacy.

¹³⁷ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 758

¹³⁸ See the following chapter on Rawls for details.

virtues/justifiability of institutions made by others gave those institutions power over me, they would “injure” my natural freedom and so be impermissible.”¹³⁹. So Simmons rejects both the impersonal and hypothetical element of Rawls' argument and suggests that Rawls does not succeed in providing a plausible conception of legitimacy. On a similar note, Simmons also rejects Kant's theory. He quotes Kant to claim that we have an obligation towards the state (both to enter and to respect it), because political authorities are necessary in order for us to carry out our duties towards others: *“for Kant the justification of the state – its necessity for the realization of freedom and rights and justice – entails an obligation to enter civil society and accept the duties society imposes.*”¹⁴⁰ In Simmons' own view, however, there is neither a “natural” obligation towards an authority, nor is there a natural duty to put oneself under someone else's authority for the sake of others. Thus the acquisition of obligation is optional to Simmons and he therefore defends an „opting-out“ option in regards to (full) state membership¹⁴¹. Only through free consent can we acquire political obligation, therefore he concludes that Kant's theory is inappropriate.

One more detail is important to note in this context: Regarding the issue of acquisition Simmons does not give any explicit statement as to which definition of consent he is actually working upon. However, he does make a lot of effort to dismiss concepts that ground legitimacy on the “attitudes” of its subjects¹⁴² and he also emphasizes the need for *actual* transactions¹⁴³. Complementing this with statements from some other papers¹⁴⁴, I take it the key aspects are: actual free and deliberate choice („voluntarism“, „signing up for“) and direct, particular interaction. Beyond that it is not entirely clear what exactly persons need to consent to in order for an authority to be legitimate. Obviously they need not consent to their existence, but to being their subject. Whether this means that they acquire state membership and are then bound by all decisions of the government as long as they do not oppose some constitutional essentials, or whether it allows for the subjects to withhold their consent regarding individual policies is not clear. In another context he states: *“all consent (...) should be understood to be consent to all and only that which is necessary to the purpose for*

¹³⁹ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 754

¹⁴⁰ See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 755.

¹⁴¹ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 760

¹⁴² See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, pp. 748-50.

¹⁴³ See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 764.

¹⁴⁴ See Simmons, A. John: Justification and Legitimacy. Essays on Rights and Obligations., Cambridge University Press, 2001, espec. ch. 5 and 8 and Simmons, A. John: Moral Principles and Political Obligation, Princeton University Press, 1979, espec. ch. 3.

which the consent is given”¹⁴⁵ In general what seems to matter most is that the normative condition of legitimacy is a form of consent which realizes freedom, particularity and actuality.

3. Evaluation

3.1 Freedom of persons and the necessity of consent

Simmons adopts „*natural freedom*“ as the central moral basis of his argument. He continuously refers to it as the central criterion for whether or not an action or claim is morally permissible and, indeed, whether an authority is legitimate¹⁴⁶. In his view, natural freedom is the reason why legitimate authorities need to be based on actual consent¹⁴⁷. In the following I will evaluate Simmons' proposal for a connection between freedom and consent. On the one hand, this means to question whether consent is actually necessary in order to account for human liberty, as Simmons claims it is. On the other, it means to assess how persuasive his conception of freedom is.

Simmons argues that since all persons are born free we can only be under the rule of an authority if we freely agree to it. This is because to be subject to an authority means that we are under an obligation, and obligation is defined as a “*limitation to our freedom*”¹⁴⁸. It means to accord to the authority a special right to act within areas within which only a person himself is “*normally free to act*”¹⁴⁹. Simmons asserts that this sort of obligation can only be generated by the performance of some voluntary and deliberate act/transaction¹⁵⁰, because the state of freedom cannot be changed bar freely, i.e. deliberately. Authority is a *right* that is not naturally there but can only be deferred by the individual him-/herself.

From this explication it becomes obvious that in order to plausibly establish the link between

¹⁴⁵ Simmons, A. John: *Justification and Legitimacy. Essays on rights and obligations.*, Cambridge University Press, 2001, p. 167.

¹⁴⁶ See e.g. Simmons, A. John: *Justification and Legitimacy.*, In: *Ethics*, Vol. 109, 1999, p. 750.

¹⁴⁷ Simmons, A. John: *Justification and Legitimacy.*, In: *Ethics*, Vol. 109, 1999, p.740.

¹⁴⁸ Simmons, A. John: *Moral Principles and Political Obligations.*, Princeton University Press, 1979, p. 7

¹⁴⁹ Simmons, A. John: *Moral Principles and Political Obligations.*, Princeton University Press, 1979, pp. 14-15 and p. 76.

¹⁵⁰ See Simmons, A. John: *Moral Principles and Political Obligations.*, Princeton University Press, 1979, pp. 14-15 and p. 57.

freedom and the necessity of consent, Simmons has to defend a certain notion of freedom. It can essentially be understood as „being under no-one else's authority (without having consented to it)“. This is why he can consistently claim both, that „*I am constrained only by how I have in fact lived and chosen.*“¹⁵¹ as well as „*If the virtues/justifiability of institutions made by others gave those institutions power over me, they would „injure“ my natural freedom and so be impermissible.*“¹⁵² Surely this makes sense, because if I am naturally under no-one's authority, and if only my own choices can bind me – then any legitimate authority, understood as having „*the exclusive moral right (...) to impose some group or persons binding duties, to be obeyed by those persons, and to enforce those duties coercively.*“¹⁵³, must result from my own choice. In Simmons view we therefore need consent, because it is what signifies a deliberate undertaking of obligation.

I am not sure that this argument succeeds in convincingly establishing the necessity of consent, for it seems that Simmons does not even rely on reasoning so much as on a convenient definition. In principle Simmons might be right in assuming that the premise of natural freedom is „*basic and plausible*“¹⁵⁴ (at least nowadays and within Western culture); and if we define freedom as being under no-one's authority it seems plausible that some transaction or deferral has to happen in order to change that status, hence consent would be necessary. Yet I think the weakness of this claim lies in the fact that it is not obvious why we should actually adopt such a conception of freedom in the first place; why freedom is to be understood as „being under no obligation whatsoever“. Simmons does not provide justification for his choice and, what is more, I think we could raise serious doubts about whether he is actually true to this notion himself.

This is because Simmons himself admits that certain general conditions have to be in place in order to actually validate consent as a legitimizing condition. For example, he wouldn't call a government legitimate that has blackmailed people into consent. Hence consent has to be „informed“ and „free“¹⁵⁵ in order to be binding. This does not yet need to pose a problem for consistency, because it could be derived directly from the assumption of natural freedom itself (for instance in the sense that freedom means freedom from threat too). However, it does not seem to account for a second set of clearly problematic cases, in which we could make an

¹⁵¹ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 762

¹⁵² Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 754

¹⁵³ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 769

¹⁵⁴ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 752

¹⁵⁵ See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 750.

informed and free decision that openly contradicts the *purpose* of protecting the individual's natural freedom, such as consent to get killed. In order to exclude those cases, we have to add the further condition that consent is valid only if it has (or does not have) a certain content or scope. This means that consent is valid only if its content is morally sound and if the scope is justifiable, which in turn implies that consent is not actually the normative condition that Simmons makes it out to be: Consent depends, for its legitimizing force, on external conditions.

Of course one could raise the objection that whenever such “invalid” consent is given it cannot actually be „free and informed“, that this is an error of the mind and that a mind can be called free and informed only if it does not give such consent. This way we would not seem to require anything but the right kind of consent for legitimacy. However, in widening the definition of consent this way, I think one would not only be obscuring the very notion of freedom Simmons intends to defend, but it is also quite pointless. This is because we would simply be shifting the location of where the problem arises. Whether we apply substantial conditions as an additional requirement, or whether we incorporate them into the concept of free decision itself, does not make any difference to the fact that it is a condition independent from actual consent. This means that even once consent is given, an authority is not free to do whatever they want, because their right to rule does not depend on consent so much as it depends on that consent's validity, which has to be defined according to consent-independent standards.

Taking this concession seriously therefore suggests that consent might be a necessary but nevertheless insufficient legitimizing transaction, because it may become void if certain additional conditions are not met. If this is true, it implies that there is at least one more standard for legitimacy in place, determining the validating premises of actual consent. In fact I think Simmons acknowledges that himself on two occasions: His criticism of Kant is largely based on the argument that, firstly, we have no independent moral duty to consent to full state membership, and that, secondly, full state membership is not necessary for fulfilling other moral duties either¹⁵⁶. At the same time, he accepts that we may be coerced by an authority we have not consented to – that is, in cases where we would otherwise violate our moral duties¹⁵⁷. Both claims seem to show that he does believe in independent moral standards,

¹⁵⁶ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 756 or p. 767

¹⁵⁷ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, pp. 770-71 (For a similar thought also see Raz, Joseph: Morality of Freedom., Clarendon, 1986, pp. 88-94.)

signified by the „moral duties“ and „moral rights“ he ascribes to persons¹⁵⁸. This demands us to acknowledge a problem also identified by David Estlund – the problem that there might be cases when actually *not* consenting is morally impermissible and hence morally „void“, because it does not make a difference to what others may or may not do, and it does not make a difference to what our duties are¹⁵⁹.

The question then is: If there are substantial and consent-independent¹⁶⁰ conditions that have the power to validate the bindingness of actual consent as well as rendering it void, and which by the same token may validate and invalidate *non*-consent – what „force“ can we actually ascribe to it at all? It seems that it has moral force only within an independently determined realm of permissible choice. Thus, actual consent can oblige us only if non-consent is in fact morally permissible. This makes consent look quite weak as a normative condition of legitimacy, because the real moral force does not lie in actual consent itself, but in its being permissible.¹⁶¹

If this is true it would have serious implications for the „moral basis“ of Simmons' theory, i.e. his notion of natural freedom, itself: The way he states it, it is clearly a misleading view. If there are cases in which others can obligate – and in fact even coerce – us, even if we have not consented, then surely he is mistaken in stating that „*I am constrained **only** by how I have in fact lived and chosen.*“¹⁶². Of course I can be constrained by my own consent to someone's authority, but more fundamentally, in certain cases others can make legitimate claims against me, even if I don't. I believe this is what a concession to fundamental moral rights entails; it entails that we can invoke them, thereby making legitimate claims against others, no matter whether they consent or not. Hence, if I act on the basis of those rights I have legitimate authority over them: I do have the moral power to oblige them, I may in fact even enforce my

¹⁵⁸ See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 750. Also see Simmons, A. John: Moral Principles and political obligation., Princeton University Press, 1979, pp.62-63. Note that he seems to adopt the Lockean idea of natural law here; for the original see: Locke, John: Two treatises of government., Cambridge University Press, 1960.

¹⁵⁹ See Estlund, David M.: Democratic Authority. A Philosophical Framework., Princeton University Press, 2008, pp. 10-12.

¹⁶⁰ Note: At this point I think it is obvious why those standards cannot be determined through actual consent – if they were, we could never avoid cases as the ones cited above. Of course we could simply accept that, but Simmons does not want to (and I think rightly so).

¹⁶¹ Note: I thereby don't deny that actual choice has moral significance (for several ways in which it does see: Scanlon, Thomas M.: The Significance of Choice., part of the Tanner Lectures on Human Values, to be found online: <http://www.tannerlectures.utah.edu/lectures/documents/scanlon88.pdf>, last visited 20 February 2009, 13:34), but I am denying that it has an unique significance in regards to moral obligations as discussed in this paper.

¹⁶² Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p.762 [emphasis added by me, ed]

claims, and I thereby impose duties on them.

Summing up we get the picture that Simmons is not fully consistent regarding the kind of freedom he upholds. On the one hand he makes it seem as if no rule applies to us, but at the same time he suggests that “natural law” still holds, and that therefore we do have to submit to certain fundamental obligations. The crux is: If we accept that there are consent-independent moral rights and duties, consent does not actually seem to be the normative condition of legitimacy like Simmons claims it is. This is because its moral force then depends on its being permissible, rather than on its being actual. Perhaps one might propose that Simmons' account of legitimacy rests on the assumption that his notion of natural freedom is of somehow superior importance to that of moral rights, but this is not the impression I get from his work.

3.2 Particularity problem and the necessity of consent

In the previous section I have shown that Simmons proposes a Lockean notion of natural freedom in order to ground his claim for the necessity of personal consent as the normative condition of legitimacy. I have also argued why I believe this to be a misleading approach. Yet I cannot deny that there is some strong moral force in the idea that authority cannot be “natural”, because if it was, there would be no point in even defending a conception of legitimacy. It *is* plausible that we are born free, and that this freedom requires us to give a good justification for how we can ever be obligated to bow our will to the decisions of an authority. For Simmons, though, giving a justification is not enough. Instead he requires consent. How can he back up this claim without having to escape to a conveniently adjusted definition of freedom?

In fact I believe his theory allows for an alternative approach that is much more forceful: the particularity requirement. Simmons' main objection against Rawls is that he does not present an account of legitimacy that is distinct from justificatory aims. His complaint is based on the assumption that only personal transactions, favorably in the form of actual individual consent, can establish legitimacy, while general justifications cannot. Basically, the main reason for why he argues for a distinction between „justification“ and „legitimacy“ is his claim that no

matter how many reasons, how many justifications there are in favor of anyone's exercise of power, we can still dismiss the claim that this obliges *us personally*: „*The fact that a state or a business has virtues that can be appealed to in order to justify its existence cannot by itself argue for its having special rights over particular individuals.*“¹⁶³ Perhaps a merely “justified” authority also has a “right to rule” in the sense that it is justified in exercising power. But even if it has this right, why should that put me under an obligation? Why should their right entail a normative claim against *me*; let alone a normative claim that goes beyond a mere duty of non-interference?

Simmons maintains that in order to create effective obligation, this obligation has to be personal. It has to attach to particular individuals, because otherwise it cannot be enforced without violating our personal freedom¹⁶⁴. Freedom matters, then, because it stands for individuality and only if an obligation succeeds in attaching to that, it can be binding for a particular person. So how does an obligation “attach” to us? Simmons maintains that an obligation applies to us personally only if it is established through a transaction that founds a special link between me (as a particular individual) on the one hand, and the individual, institution, or system claiming authority over me on the other. Even if there is reasonable ground for obligation this is not sufficient to make obligation personal. Only if it is personal though, it is actually binding for particular individuals. Thus, we need to make obligation personal for it to apply, and since we are free, it can only apply if we make it apply ourselves, if we defer the right to act within our scope of freedom through consent¹⁶⁵.

Now, in order to evaluate this claim two steps are in order. First, we need to evaluate whether the particularity requirement is plausible. Since Simmons himself does not provide an elaborated argument, I will explicate how I think one could support his claim with reference to the work of Christine Korsgaard and Tom Christiano. Second, I will then assess whether the particularity requirement renders consent necessary for legitimacy the way Simmons claims it does.

As a matter of fact I believe that Simmons realizes a very real intuition when claiming that obligation has to be personal. It does seem reasonable to assume that moral claims have to attach to real, particular individuals, because they are the ones that actually invoke those

¹⁶³ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 752

¹⁶⁴ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 754

¹⁶⁵ See Simmons, A. John: Moral principles and obligation., Princeton University Press, 1979, p.77.

claims and they are the ones that those claims are made against. For example, Christine Korsgaard points out: “it is we who **make the** [moral] laws” but also it is we “*who give ourselves the* [moral] laws”¹⁶⁶ That is to say that as persons, we are the source *and* subject of obligation. Therefore it is not sufficient to establish that there is obligation, it also has to be established whom it concerns, because obligation is owed *by* someone *to* someone. It signifies a particular relation and is not simply “there”¹⁶⁷. That is to say, if obligation is meant to concern us, it certainly matters that there is a link between the two parties in question. Consequently, exactly who is obligated towards which authority is a relevant question when we mean to talk about legitimate rule. So I believe that Tom Christiano has actually pointed in the right direction when he observed:

“The instrumentalist approach¹⁶⁸ seems to be committed to the idea that an authority can be legitimate even if most of the members of the society do not agree with what it is doing. (...) consent theory clearly makes an attempt to make political authority compatible with a due respect for the opinion of subjects.”¹⁶⁹

He thereby suggests that what makes consent appealing as a normative condition of legitimacy is that it gives due weight to respect to us as persons. This is because freedom is not so much about whether we are under an obligation or not, but about the fact that we are persons, i.e. autonomous agents, who have a right to think, decide, reason and act for themselves. It is because we are agents that the claims of morality even apply to us¹⁷⁰. That is to say that morality is not a “general” fact, not a watering-can that is spilled from nowhere onto whatever being there is. It comes from somewhere and it addresses someone, it has a source and it has a target, it is not simply there. Only if we acknowledge that, only if we acknowledge that morality addresses *persons*, the concept of obligation makes sense.

Against this line of argument one might object that it is inappropriate to work with an argument that has been developed for the moral context while the issue of authority belongs to

¹⁶⁶ Korsgaard, Christine: *The standpoint of practical reason.*, Garland Publishing, 1990, p. 279 (emphasis added by me) – Note that she makes this statement in the context of Kant's categorical imperative, which is why I added the term “moral” to her sentence as to not cause confusion (e.g. as if she were talking about political instead of moral law).

¹⁶⁷ See Simmons, A. John: *Moral Principles and Political Obligation.*, Princeton University Press, 1979, pp. 7-11 and pp. 31-37 for emphasis that obligation signifies a “special relation” between persons.

¹⁶⁸ Note that “instrumentalist” refers to an approach which claims that an authority is legitimate if it leads to certain outcomes or aids in bringing them about (e.g. Joseph Raz).

¹⁶⁹ Christiano, Tom: *Authority.*, In: *Stanford Encyclopedia of Philosophy*, first published 2004 (to be found online at: <http://plato.stanford.edu/entries/authority>, last visited on March 6th 2011, 16:51)

¹⁷⁰ See Korsgaard, Christine: *The sources of normativity.*, Cambridge University Press, 1996, p. 19.

the political sphere. Those readers I urge to keep in mind that in my view legitimacy actually is a moral concept, because the normative requirements it defends are inherently moral in nature. Thus, the obligations we are talking about here are also meant to be thought of as “moral” (not legal, for example). Also note that I have used the work of Korsgaard although Simmons' explicitly rejects the Kantian tradition she upholds. However, I deem this permissible, because Simmons himself does not offer fundamental justification for his view. His key claim is that obligation has to be *acquired*¹⁷¹, and that it has to be so, because we are free. Yet, as I have pointed out in the foregoing section, his defining freedom this way is not entirely plausible and so I think we have to turn to alternative views in order to find an appropriate basis for the particularity requirement. That is to say, even if Simmons' justification of the particularity requirement is flawed, this need not affect the plausibility of the requirement itself.

Thus, I conclude that the particularity requirement is indeed a highly significant claim and that Simmons is right in pointing out its importance. Consequently, the next question is whether that makes consent a necessary condition for legitimacy the way Simmons claims it does.

In stating that the particularity requirement demands consent as the normative condition of legitimacy, Simmons asserts two things. First, he suggests the normative condition of legitimacy needs to be particular. Second, he presumes that in order for a normative condition to be particular it needs to trace back to, and apply to, particular human beings. In his view justification via reasons is not particular (enough), because it need not trace back to every individual subject of a society, but it could, in principle, be provided through the reflective process of only one person, while still claiming to obligate everyone. In contrast, consent is an individual transaction that, if actually performed, can account for particularity. This is why Simmons' theory is based on the premise that the only way to establish particularity is consent. Is that plausible?

In fact, I do not think it is, because he underestimates the potential particularity of reasons. Simmons claims that just because something is „*consent-able*“ in the sense that I would be justified or even morally and/or rationally compelled to consent, that does not mean I am bound by it, because I have not in fact consented. He asserts that reasons do not – without my

¹⁷¹ See Simmons, A. John: *Moral Principles and Political Obligation.*, Princeton University Press, 1979.

consent – apply to me, instead they are general, abstract and universal norms. This means they are not particular enough to create obligation and thus consent is required instead (or, rather, in addition to reasons). But that begs the question: If there is reason to act morally, does that not mean that *I* ought to act morally? If there is reason not to kill humans and this reason consists in the fact that every human has a right to live, does that not mean that *I* must not kill *you*, that it is (amongst others) *my* duty not to kill you? Granted, those sorts of reasons do not only apply to me, but seem to apply to anyone. In this sense Simmons might be right to assert that moral reasons are general. But that does not mean that they cannot be particular too. The fact that they have the power to apply to us all does not mean that in the end they apply to no-one because they are not anyone's own. Universality and particularity do not seem to exclude each other when it comes to moral reasons. In fact I would go even further and suggest that reasons cannot be universal if they are not particular too. For universality seems to imply, not that a reason is anyone's, but that it is *everyone's*. So I would think that reasons do apply to particular persons, because otherwise where would they come from?

Against this line of argument one could object that while my claim of universality is true for the examples cited above, it is not true for all normative reasons. For example, Thomas Nagel argues that there are reasons that spring from a person's special relationship to their own projects and that have no direct normative force for others: A person's desire to climb the Kilimanjaro might give him reason to do it, but this reason need not apply to me. Perhaps his reason gives me reason to respect his project or not to interfere, but it is not a reason for me to climb the Kilimanjaro¹⁷². I agree that this is a problem if we suppose that by “justification” we refer to a state where there is *some* reason supporting authority. Just because there is some reason, does not mean that there is reason for me, hence the particularity requirement would not be fulfilled. However, I do believe that one can escape that problem by clarifying what sort of justification is required for legitimacy. For example, one could specify procedures for how to discover the relevant reasons, which would then limit the sort of reasoning that can justify legitimacy. To conclude one could thus state that while not just any justification can ground legitimacy, justification on the right kind of reasons may well be sufficient.

¹⁷² See Nagel, Thomas: *The view from nowhere.*, Oxford University Press, 1986, p. 167.

3.3 Motivational force and the necessity of consent

So far I have evaluated two arguments for consent as the normative condition of legitimacy – natural freedom and the particularity requirement. Simmons actually offers a third reason for why we need consent, and that is its “motivational force”.

In short, his deduction seems to rely on the premise that in order for legitimacy to have practical meaning, it needs to be effective. Any legitimate authority also needs to be a *de facto* authority, because without the actual ability to implement their rule, we cannot speak of a (practical) authority at all, and hence cannot speak of a *legitimate* practical authority either. Since it is unlikely, or at least highly impracticable, that an authority could rule without at least minimal compliance on part of the subjects, legitimacy needs to involve some kind of motivational force. This is to say, no authority, legitimate or not, can coercively enforce every rule on everyone all the time, so obligation cannot be discharged “at gunpoint” alone, subjects need to live up to their duties themselves. In order for them to do so – so goes the assumption – they need motivation. Therefore, all things being equal, a conception of legitimacy that accounts for the motivation of subjects is to be preferred over one that does not.

If Simmons is able to establish that consent has a greater likelihood of establishing motivation on part of the subjects than other normative conditions of legitimacy do, this would be one weighty argument to require consent for legitimacy. Were consent the only normative condition that has this virtue, the argument would be that much weightier. Thus, the obvious question is: What motivational force does consent have regarding the fulfillment of obligation towards an authority? How does it fare compared to other conceptions of legitimacy?

Simmons makes an attempt to answer both questions. As a reference point he uses Rawls' conception of legitimacy, but it seems to me that this is seen (by Simmons) as a place holder for virtually any theory that does not base legitimacy on consent, be it more instrumentally oriented (like Raz') or have its focus on the conditions of justification (like Rawls'). Due the course of the following assessment I will try to generalize Simmons' arguments, avoiding explicit reference to Rawls' for two reasons. One is that I myself have not yet given an account of the Rawlsian argument, so I would need to do this now in order to make sense of Simmons' argument: However I think this would be confusing, which is why I will come back

to Rawls in a later chapter. Another reason is that even if I did consider Rawls in this context, I would also need to consider possible discrepancies between the Rawlsian view as I understand it and the view as perceived by Simmons, which would surely exceed the scope of this paper. Thus, the focus of this section is on Simmons' own account and the claims he makes, not so much on the approach he tries to defeat.

In fact, Simmons' main claim regarding motivation is that obligations acquired through actual choice are „*more likely to be motivationally efficacious*“¹⁷³ than those derived from hypothetical choice. He does not provide an explicit argument for this, but he seems to assume that an obligation must be perceived as „direct“, „internal“ and „obvious – that I have to *feel* bound – in order for it to have motivational effects. For example: If you bring up a good reason why I am obligated to do X and I consent to do X, then I perceive the obligation to stem from my consent. I feel bound by it because I have freely, and personally, and actually, accepted it. Simmons suggests that I feel bound, not by my reasons for consenting, but by the fact that *I have* consented. The fundamental question of motivation for Simmons is “Why should I?”, and in case of consent the immediate answer is “Because it was my own choice.” Note that there is a twofold emphasis here: I feel bound because *I* have consented, but also because I *have* consented. The actual as well as the personal is important to Simmons, and both is relevant for our motivation. After all, if I personally have consented to something, how could I not be motivated to do it? That is, if I did not want to do it, I probably would not have consented to it in the first place. Therefore, the things that we have actually consented to, seem to be a safe bet in terms of fulfillment and this means that obligations that are acquired through consent are likely to be motivationally effective.

Is this plausible? At first sight I think it might seem this way. Yet, after closer examination it appears misleading, because it neglects the following fact: I feel bound by my consent only if I sincerely believe I was *right* in consenting. For example, I will keep a promise only if I believe that it is right to keep promises *and* that my making the particular promise was right. Clearly there are situations where this will not be the case and where I will, permissibly or not, deny my obligation and not feel bound by it, no matter whether I gave my consent or not. Note that this is not a claim about what makes a choice „right“, or even permissible, but, along Simmons' lines, it is a claim about what it takes to *feel* bound, to *believe* I am right, to *perceive* my actions to be the right ones.

¹⁷³ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 762

For emphasis I propose the following example: I promise you to let myself be killed by you. It is a case of actual consent and according to Simmons it should therefore establish an obligation to follow through with it. He furthermore claims that usually I will want to go through with this, have a motivation to do so, because I have consented. After all, I would not have consented if I were anything *but* motivated. Now, besides the fact that it is highly questionable that this particular promise would morally oblige me, I also doubt that an average suicidal person would let themselves be killed, because they *agreed* to it. That is to say, I doubt that they would do it because they feel bound by their consent. It seems more plausible to me that if they are motivated, they are so for the reasons that made them consent in the first place. If I agreed to it because I am unhappy, then the reason I will let myself be killed is *because* I am unhappy, not because I agreed to be killed.

Of course there could also be the opposite case: I promise you to tell you my best friend's secrets. It is a case of actual consent and it is obviously much less extreme than the previous example, meaning that the content of my consent is probably permissible as an outcome of free choice (though it is probably not ethical, but that is a different question). Now, I might think that I was wrong in making this promise in the first place, maybe because I made it for the wrong reasons (for example because I was mad at her) and therefore I may not feel bound by it. In that case, the previously given consent would not be “motivationally efficacious”. I do not feel bound by an agreement I made for the wrong reasons and that is not because I was un-free or un-informed at the time, it is because I aim to act for the right reasons and after re-evaluation I would see that this does not hold in this particular case.

The point I am trying to make is that motivation depends on my belief of being right, of having good reasons, and of being able to justify myself to others, rather than on actual consent or non-consent. We claim that others should accept our choices, because we have good reasons, not simply because we *did* make them.¹⁷⁴ Of course I might do what I have consented to, but whether I do it or not does not seem to depend solely on whether I have consented to it or not. Even if the facts in virtue of which we feel an action is „right“ aren't themselves motivating, neither is actual consent. But *if* the latter can motivate us then this is because the former can, and thus the motivational effect counts for both, and the one does not

¹⁷⁴ See Korsgaard, Christine: *Creating the Kingdom of Ends.*, Cambridge University Press, 1996, espec. Ch.11 and Korsgaard, Christine M.: *The Sources of Normativity*, Cambridge University Press, 1996 for similar thoughts about practical reason and motivation.

have more force than the other.

Some might object that this claim is weak, because it relies on mere intuition. I admit that I am making assumptions about average empirical behavior without offering actual proof that this is how persons feel, and I agree that this renders my argument unsatisfactory to some extent. However, against this objection I counter that my approach is permissible, because Simmons too makes his argument on this level and so in order to confront his claim I need to meet him there. All in all I thus conclude that Simmons is mistaken in thinking that the motivation to live up to our obligations needs to be derived from actual consent. This is because the motivational force of consent relies on our reasoning, or rather our belief that we are right in reasoning so. For having this belief we do not require consent, and this is why I would be very cautious to accept a special role of consent when it comes to the motivational basis of legitimacy.

3.4 Justification vs. Legitimacy

In the foregoing sections of this paper I have raised some serious doubts about the plausibility of Simmons' claim that only consent can establish legitimate authority. In particular, I have argued that his theory is based on a misleading conception of freedom and that it is not entirely convincing why the particularity requirement, which I have accepted as a reasonable demand, should call for consent, or why consent should be more motivationally effective than justification. All of my objections are based on the suggestion that reasons are more significant than consent when it comes to morality. On the one hand I have shown that the normativity of consent is fundamentally rooted in its being permissible and that this permissibility, since it cannot itself depend on consent, needs some independent standard most likely to be provided through reasons. On the other hand, I have rejected the view that reasons are not particular and thus insufficient to create obligation for non-consenting individuals. In so doing I seem to have rejected the central premise of Simmons' work, i.e. that justification and legitimacy are two different normative concepts characterized by distinct normative conditions. Does this mean I need to dismiss his distinction altogether?

Simmons argues that justification is a general concept, whose normative condition can be

established abstractly, by giving reasons, for example by arguing that the authority achieves rationally desirable outcomes or that it lives up to certain moral requirements¹⁷⁵. Legitimacy, on the other hand, cannot be established abstractly, but is signified by an actual relation between a particular authority and its particular subjects. It can only be established if the individual consents to a limitation of his/her natural freedom, thereby deferring to the authority a right to make binding decisions for him/her¹⁷⁶. Thus, if we want to find out whether an authority is justified, we need to ask whether its existence and its exercise of power is supported by good reasons, whether there is good reason for it to be an authority. If, however, we want to inquire about legitimacy, we need to ask whether those subject to the authority have actually consented to its rule. Anyone might be able, with an appropriate knowledge of the subject, to determine whether an authority is justified. To determine whether an authority is legitimate, though, is not possible without reference to the the actual choice of particular persons, and thus more likely to be a first-person question. This is because in the end only I myself can know for certain what it is that I have (not) consented to.

Note that it is easy to be misled by Simmons' distinction. One might think that the difference between justification and legitimacy is whether an authority's rule is good in general, or if it is good for particularly me. But this is certainly not what Simmons means to say, for he explicitly states that no matter how good an authority's rule is for me personally, that does not legitimize it in the sense that it creates a comprehensive obligation for me to comply with their directives, nor does it give them a right to enforce them on me¹⁷⁷. The thing is, no matter how good a consequence a rule might have for me, only I can legitimize their authority over me. I think we could therefore rephrase the questions to read: First, is there reason for anyone to consent to that authority's rule? If the answer is yes, the authority is justified. Second, is there reason for me to consent to that authority's rule? If the answer is yes, the authority might be justified in exercising its rule over me, though it is nevertheless illegitimate. As Simmons points out: "*I can pass up morally acceptable good bargains if I wish.*"¹⁷⁸ In this case it might have a justification right to rule, but this right does not correlate with an obligation on my end. Instead my obligation is achieved only if the third question can be confirmed, which is: Have I consented to that authority's rule, and has this consent been free, informed and deliberate?

¹⁷⁵ See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 740.

¹⁷⁶ See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 745.

¹⁷⁷ See Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 752.

¹⁷⁸ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 754.

In evaluating this aspect of Simmons' theory I find myself ambivalent. On the one hand I find Simmons' argumentation analytically compelling, because it allows for a more nuanced assessment regarding the moral status of political authorities. This is to say, I think there is merit in differentiating between authorities for which there is justification in being authorities, and those that are actually justified in exercising their authority towards their actual subjects. It helps us classify authorities more accurately, thereby improving our ability to formulate moral concerns. Furthermore it might be useful in order to judge the status of an authority towards different social classes. For example, a state might discriminate between societal groups based on sex, race or income, being legitimate ruler of some but not of others. In such a context, to differentiate between overall-justification and particular-legitimacy would help us make sense of the authority's moral status better than a view that distinguishes only between legitimate and illegitimate authorities.

That said, I remain unconvinced by Simmons' conception of legitimacy. Neither the notion of freedom he refers to, nor the particularity requirement can conclusively ground the necessity of consent as its normative condition. In fact, I suggest that while Simmons is right in distinguishing between justification and legitimacy, I do not believe he is right in asserting that their normative conditions are equally distinct. Simmons suggests that only questions regarding justification can be answered through reasons, while legitimacy needs personal consent which does not necessarily need to depend on (good) reasons¹⁷⁹. In contrast, I have pointed in the direction of a view through which both questions could be answered by the appeal to reasons. For example, one could suggest that the difference lies in which sorts of reasons are referred to, or rather, which sort of reasoning applies. On a Rawlsian approach, perhaps the difference is between *rational* and *reasonable* justification¹⁸⁰. Thus one could incorporate both, the instrumental (= justificatory) as well as the particular (= legitimacy) aspect of Simmons' demand, while still relying on *reasons* as the central moral category. Or one could follow Raz in distinguishing between reasons that are reasons for everyone ("agent-neutral reasons") and those that are reasons just for some persons or groups of persons ("agent-relative reasons")¹⁸¹. This would allow for the argument that only certain agent-neutral reasons can establish legitimacy, and perhaps that any legitimate authority must be supported by a sufficient amount of them. Either way I believe one could live up to

¹⁷⁹ Simmons, A. John: Justification and Legitimacy., In: Ethics, Vol. 109, 1999, p. 740

¹⁸⁰ See Rawls, John: Political Liberalism (Expanded Edition), Columbia University Press, 2005, pp. 48-54.

¹⁸¹ See Raz, Joseph: The Morality of freedom, Oxford, 1988, p. 146 and p. 314 for details on this distinction.

Simmons' distinction without having to defer to consent (or another normative condition that is (seemingly) independent of reasons, for that matter)¹⁸².

I conclude that Simmons' call for an analytical distinction between what he calls justification and legitimacy deserves support. Yet I think that their normative conditions should cohere, meaning that both are based on morally sound reasoning. The question that is then still open is what exact kind of reasoning is required in either of those cases.

4. Conclusion

In this chapter I have provided an overview of Simmons' conception of legitimate authority. For him it entails a right to rule and coercively enforce decisions, and it correlates with an obligation to obey on part of the subjects. Legitimate authority has to be distinguished from merely justified authority which does not infuse the subjects with an obligation to obey, even though the authority's rule is morally permissible or even desirable. The reason for this is that all persons are born free, and therefore they can be under no obligation unless they themselves defer the right to make binding decisions. Legitimacy therefore depends on the free consent of individuals, because only this transaction can found the special link between an authority and its subjects. Furthermore, only if the subjects have consented to an authority's rule, they are motivated to comply with their obligations, and this is relevant because only an effective authority can be a legitimate authority.

The main objection I have raised against all these arguments for consent is that I do not believe that it actually has the normative force ascribed by Simmons. This is because consent can only be binding if it does not oppose morally fundamental reasons or rights, and when it is binding, it is so because it lives up to those reasons /or at least does not oppose them). Actual consent does indeed have moral significance, especially when it comes to responsibility and self-esteem, yet I reject the view that it establishes legitimacy. Moreover, I am not convinced by Simmons' argument that consent is the most effective way to ensure the subjects' motivation. It seems more plausible to me that we feel bound by what we perceive to be our *reasons* for consenting, not so much by our actual consent. Throughout my evaluation

¹⁸² Note that I do not thereby claim that either Rawls' or Raz' view is entirely convincing. In this context my aim was simply to give some suggestion for how other conceptions could be rephrased to live up to Simmons' premise, without however leading to the same conclusion.

of Simmons' theory I have thus concluded that his aims are appealing, but that they need another normative basis than consent. In particular, I have argued for the moral force of reasons, but I have not yet been able to give an indication as to what sort of reasons are relevant for legitimacy, or what sort of reasoning is required.

V. JOHN RAWLS

1. Legitimacy as reasonable acceptability

In the present chapter I will deal with the conception of legitimacy as presented by John Rawls in his famous work “Political Liberalism”. First I will explicate the framework of his theory, then I turn to evaluate its plausibility. In the end I shall not only be able to draw a conclusion regarding the merits and holes of Rawls' account, but also determine how it fares compared to other theories like that of Raz and Simmons.

I proceed by firstly giving an overview of the main points of his theory. On the one hand, this involves an explication of what Rawls assumes to be the subject of legitimacy. As we will see, he emphasizes the aspects “political power” and “coercion” in his account of authority. Furthermore, it is important to clarify what he means when he says that political legitimacy requires a political conception of justice, when at the same time he argues that his is a moral approach. With those distinctions made I can turn to flesh out the core of his argument; that for the “liberal principle of legitimacy” and argue that its normative force relies on a specific notion of the “reasonable” which forms the basis of his thinking. In this context, it will also be important to analyze the “Original Position”-method, a hypothetical procedure which is used to deduce principles of justice and legitimacy.

After this general overview I aim to evaluate Rawls' conception by determining the plausibility and persuasiveness of his arguments. Leading questions will be: Is the liberal principle of legitimacy convincing? How is its normativity established? Is it successful in integrating moral claims for a political purpose? The objections I consider regard, for example, his idea of public reason, the original position and its implication of “hypothetical

consent”, as well as Rawls' presupposition of democracy. In addition to that I address Rawls' notion of reasonableness and analyze its role for legitimacy.

All in all it should be acknowledged that John Rawls still is one of the most important normative theorists today and it is obvious that within the limited scope of this paper I will not be able to address his thinking in all its complexity. However, I claim to pick out the main ideas relevant for his condition of legitimacy and make them comparable to those of other thinkers.

2. Rawls' theses on legitimate authority

2.1 Preliminary clarification

Liberal principle of legitimacy vs. justice as fairness

Before turning to a detailed description of Rawls' work on legitimacy, there is one important clarification to make. It concerns the relation between his “liberal principle of legitimacy” and his conception “justice as fairness” and it is essential, because I believe those two could easily be confused.

In fact, before the publication of “Political Liberalism”, Rawls' main work was “A theory of justice”¹⁸³ (often simply referred to as his “*Theory*”). It was first published in 1971 and presented a substantive account of how rights and duties can be distributed justly within a society. The fundamental moral question he started out from could be stated as:

*“what is the most appropriate conception of justice for specifying the terms of social cooperation between citizens regarded as free and equal (...)?”*¹⁸⁴

¹⁸³ See Rawls, John: A Theory of justice, Belknap, 1971.

¹⁸⁴ See the introduction to the paperback edition of “Political Liberalism” (as can be found in Rawls, John: Political Liberalism., Columbia University Press, 2005). Here Rawls gives a good overview of how “Political Liberalism” is developed compared to the “*Theory*”.

On the basis of a well-developed argument he then defended two “principles of justice” and integrated them to form a distinct conception of justice, which he called “*justice as fairness*”. He claimed it was the most appropriate answer to this question, especially compared to utilitarianism. However, the problem he later discovered was this: In his work on justice he had failed to acknowledge the fact that the members of a political community are bound to be divided by “*reasonable pluralism*”, i.e. there will always be disagreement on particular issues of justice and this disagreement is not the outcome of misguided reasoning, but it is a morally neutral fact. Nevertheless it posed a problem to Rawls' conception of justice, because in his “*Theory*” he actually presumed that people, at least under ideal conditions, could all endorse those principles based on a shared belief system (or what he came to call “*a comprehensive philosophical doctrine*”¹⁸⁵). In the end that made his argumentation “*unrealistic*”¹⁸⁶, Rawls concluded.

When analyzing “Political Liberalism” this background is of immense importance, because it lays out the aim of his argument. “Political Liberalism” was not simply written after the “*Theory*”, it was written as its adaption. What Rawls is trying to do in this book is to defend *justice as fairness* as the appropriate conception of justice, *even* against the background of reasonable pluralism. To put it differently: Rawls wants to convince people to accept it as the most appropriate conception of justice, although they cannot be required to endorse the comprehensive moral view that led Rawls himself to endorse those principles. Against this background, one has to be aware that Rawls starts off into his argument with the most “*fundamental ideas*” already in place¹⁸⁷. Yet he feels the need to adapt them to a quasi-new goal; the justification of *justice as fairness* as the most appropriate conception of justice in a pluralistic society.

Note that this is exactly where his concern for legitimacy comes into play. As we will see in a later part of this chapter¹⁸⁸, legitimacy matters for Rawls because of reasonable pluralism. In short: Political authority has to be justified, because it goes along with the imposition of a unified system of law. This is in need of justification, because if we view people as “free and equal” unification and disagreement seem incompatible at first. Now, what Rawls suggests is

¹⁸⁵ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. xvi for Rawls' own assessment.

¹⁸⁶ Rawls, John: Political Liberalism., Columbia University Press, 2005, p. xvii

¹⁸⁷ See Rawls, John: Political Liberalism., Columbia University Press, 2005, Lecture I for an overview.

¹⁸⁸ See the previous chapter on Simmons for details.

that a political authority properly justified is a *legitimate* political authority. Legitimacy can, however, be realized through various different conceptions of justice. What they all have in common is that they are *liberal*¹⁸⁹ (i.e. take seriously the freedom and equality of persons, as well as their right to disagree on “*the good*”) and *political*¹⁹⁰ (i.e. they are based only on fundamental public values but do not interfere with people's private convictions). In so far as they live up to those conditions, they are all “appropriate” conceptions of justice, and so they are all appropriate answers to the question:

*“how is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”*¹⁹¹

Nevertheless, Rawls' aim in “Political Liberalism” is to defend *justice as fairness* as the *most* appropriate conception of justice. As a consequence, what he does in this book is not only to frame the problem of legitimacy (by explicating the idea of reasonable pluralism and its moral implications) and to develop a normative condition that can be used as a “legitimacy test”. Instead, this line of argument is intertwined with all, a description of *justice as fairness*, an argument for how *justice as fairness* lives up to the condition of legitimacy, and a defense of *justice as fairness* as the conception of justice that *best* realizes that condition.

Unluckily for me and my aim in this paper, those lines of thought, although separate in their aim, are not actually presented as different lines of argument and so his conception of legitimacy is quite mixed up with the particular kind of realization he defends. This has several implications: First, it means that in the following assessment I will have to be very careful to determine which arguments Rawls actually uses to support which claim; i.e. whether they are made for claims of legitimacy in general or for claims of *justice as fairness* as a particular version of it. Second, since my concern here is for Rawls' conception of legitimacy, it means that the only claims I will refer to are those of the former sort, that is those ideas he develops for legitimacy in general. Put differently, of the five lines of argument developed by Rawls in “Political Liberalism” only two will be analyzed in this paper. I will

¹⁸⁹ See Rawls, John: *Political Liberalism*., Columbia University Press, 2005, pp. 134-5.

¹⁹⁰ See Rawls, John: *Political Liberalism*., Columbia University Press, 2005, pp. 137-8.

¹⁹¹ Rawls, John: *Political Liberalism*., Columbia University Press, 2005, p. 4

deal with how he frames the problem of legitimacy and with the normative condition he develops. I will not, however, deal with *justice as fairness* in general (i.e. as a conception of justice) or in the context of legitimacy (i.e. as a conception of justice that is claimed to live up to the condition of legitimacy), or with the defense of *justice as fairness* as the “most appropriate” conception of justice.

I urge the reader to keep in mind these clarifications, because they are meant to justify which of Rawls' momentous ideas and arguments I consider and which ones I have decided to neglect within the context of this paper. Needless to say that his defense of *justice as fairness* would also make for an interesting and indeed significant research field, but it simply exceeds the focus of this work.

2.2 Definition of legitimate authority

Acceptable constitutional essentials in a democratic society

In his book “Political Liberalism” Rawls develops the “liberal principle of legitimacy” (LP), which is defined as follows:

*“our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”*¹⁹²

For analyzing this definition, I suggest it is helpful to distinguish two parts. Part one concerns Rawls' approach to authority and the background assumption he makes for his theory. Part two concerns the normative condition he develops for legitimacy. In the present section I clarify the first part, in the next one I will then concentrate on explicating the normative condition.

As we have seen, Rawls' LP begins: “*our exercise of political power is fully proper only when...*”. The first thing that thus becomes evident is that Rawls does not refer to the term

¹⁹² Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 137

“authority”, but instead talks about the “*exercise of political power*”. I believe this is a consequence of how Rawls frames the problem of legitimacy: He contends that the fundamental issue of political justice lies in the fact that societies are marked by *reasonable pluralism*. That is to say people are known to hold different convictions about religion, politics and morality. However, this variety does not (only) stem from people being irrational, egoistic or plain wrong, but it is the “*normal result of the exercise of human reason*”¹⁹³. Despite that, there is a “*need to impose unified law*”¹⁹⁴, that is, even though the subjects of a political authority may well hold different convictions, the law still has to be the same for everyone (within a political community). Hence the question is on what principles we can base the making of law, if there seems to be disagreement on what the right principles are, and if indeed agreement on this issue cannot be expected at all. By putting the question this way, Rawls naturally emphasizes the aspect of legitimate coercion, because it is only due to the fact that the law is binding on everyone that reasonable pluralism poses a problem. This is why he does not concentrate on obligation or the right to rule as much as Raz or Simmons do. I nevertheless maintain their theories are comparable, because as I stated in my own clarifications all three aspects (justified coercion, obligation and right to rule) can be viewed as related under the flag of “legitimate authority”¹⁹⁵.

Rawls' LP continues stating that the exercise of political power is “*fully proper only when it is exercised in accordance with a constitution*”. What he seems to say is that political power *ought to be* exercised in accordance with a “*constitution*”. This is relevant for two reasons. For one it suggests that the standard of legitimacy is applied first and foremost to the macro-level of politics. That is to say, particular directives derive their justification from the legitimacy of the authoritative system as a whole; the LP does not apply to them directly but refers to the political framework shaping them. In Rawls' own words, legitimacy applies to “*the general structure of political authority*”¹⁹⁶, i.e. the constitution and procedures defined therein. It is not about everyday policy-issues, but about the fundamental question of how and according to what principles those decisions should be made. Note that this stands in contrast to Raz, who claims that the legitimacy of individual directives has to be evaluated¹⁹⁷.

¹⁹³ Rawls, John: *Political Liberalism*., Columbia University Press, 2005, p. xvi

¹⁹⁴ Wenar, Leif: John Rawls., In: *Stanford Encyclopedia of Philosophy*, 2008 (online at: <http://plato.stanford.edu/entries/rawls/>, last visited on 24 April 2011, 16:49) – Note that the emphasis was added by me.

¹⁹⁵ See the previous chapter on preliminary clarifications of this paper.

¹⁹⁶ Rawls, John: *Political Liberalism*., Columbia University Press, 2005, p. 393

¹⁹⁷ See the previous chapter on Raz of this paper.

When Rawls mentions a “constitution” in his definition of the LP, I believe he also points to another important aspect of his theory: democracy. As a matter of fact, all Rawls ever says about legitimacy, is said about legitimacy “*in a democratic society*”¹⁹⁸. This means that he presupposes democracy as a background condition of his theory. Yet he does not make an explicit argument for whether democracy is required for legitimacy, nor does he take time to justify *why* he picks this focus. The only thing he clarifies right from the beginning is that he assumes “*highly idealized*”¹⁹⁹ conditions in making his argument, and he states that this is for analytical purposes. As for the role of democracy, it is left open whether this means that a separate conception of legitimacy would be necessary for a different kind of regime (for example, different standards of legitimacy might be seen to apply depending on the form of government, whether it is a democracy or monarchy for instance), or whether he thereby implicitly assumes that democracy is actually necessary for legitimacy in general. In short, the question remains whether “democracy” is part of the form or content of his conception of legitimacy; whether it merely limits the scope of his theory or whether it itself establishes a normative condition. In any case, what we should keep in mind is that he does indeed develop his argument against the background assumption of a constitutional democratic regime, i.e. “*for*” a democratic society²⁰⁰.

2.3 Normative condition of legitimacy

Reasonable acceptability, political justification, hypothetical consent

In the previous section I have explicated Rawls' approach to the problem of legitimacy in the context of political authority. I have pointed out that he emphasizes the aspect of legitimate coercion, because for him the problem of legitimacy arises against the background of reasonable pluralism that persists despite the need to impose unified law. Furthermore, the concept of legitimacy applies only to the constitutional essentials of a political authority, and he assumes it to be a democratic regime. In the present section I now aim to focus on the normative condition Rawls proposes for legitimacy. As a matter of fact, his theory allows for three different explications which I will outline in the following.

¹⁹⁸ See e.g. Rawls, John: *Political Liberalism*, Columbia University Press, 2005, pp. 3, 11, 14, 35 for various points at which he emphasizes this fact. Also see Cohen, Joshua: *For a democratic society*, In: Freeman, Samuel (Ed.): *Cambridge Companion to Rawls*, Cambridge University Press, 2003 for a good explication of democracy's role in Rawls' thinking.

¹⁹⁹ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 35.

²⁰⁰ See e.g. Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 169.

I begin by interpreting the second part of his LP and argue that it proposes “*reasonable acceptability*” as the normative condition of legitimacy. Next I show how “*political justification*” can be seen as an alternative explication of Rawls' normative condition. In the end I turn to his idea of “*hypothetical consent*”, which relies on the same principles but is arrived at from a different line of argument. I am aware that this approach may seem repetitive, because as we will see, all three argumentations rely on similar concepts and thoughts. However, the aim of this paper is not only to assess the plausibility of various normative conditions proposed for legitimacy, but also to determine the persuasiveness of arguments brought forward to support those conceptions. This is why I deem it justified and indeed necessary to assess all three lines of argumentation, because it allows me to conduct a more thorough examination.

2.3.1 Reasonable acceptability

The second part of Rawls' LP states that political power ought to be exercised in accordance with a constitution the essentials of which

*“all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”*²⁰¹

In short, this seems to suggest that political authority needs to rely on principles that are reasonably acceptable to all citizens as free and equal. “*Reasonable acceptability*” is then the normative condition of legitimacy. But what is that supposed to mean? There are two categories here, first acceptability and second reasonableness.

When Rawls explicates his notion of legitimacy, he claims that the exercise of political power must rely on an acceptable constitution. To clarify what “acceptability” means may seem trivial, but is actually of immense importance for understanding his claim. This is because when talking about what citizens can “*reasonably be expected to endorse*”²⁰², Rawls is obviously not concerned with what people do endorse. His claim is not dependent on *actual* acceptance, but it is about what people “*can*” accept. More specifically, it is about what

²⁰¹ Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 137

²⁰² See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 137.

people can *reasonably be expected* to endorse. This points to the fact that it is not acceptance, but *accept-ability* which matters for legitimacy, which is important, because the latter is a hypothetical notion. For something to be *acceptable* does not mean that it is actually endorsed by anyone, but it is sufficient that it *could be* endorsed, or that it would be, under certain conditions. Legitimacy is then what people could be expected to accept under those conditions.

In order to explain what those conditions are, Rawls develops the notion of reasonableness: To Rawls a person is reasonable, if he/she is willing to “*propose fair terms of cooperation and to abide by them provided others do*”²⁰³. Thus, a principle one can reasonably be expected to endorse is one that a person would accept were they reasonable, i.e. were they willing to propose and abide by fair terms of cooperation. Rawls specifies this even further by stating that the constitutional essentials need to be acceptable to people's “*common human reason*”. Due to what he calls the “*burdens of judgment*”²⁰⁴ even reasonable people need not agree, but can reach different conclusions when it comes to matters of justice. However, what distinguishes reasonable people from unreasonable ones is that they are willing to recognize the burdens of judgment and the reasonable pluralism stemming therefrom²⁰⁵. In doing so, they also recognize that they can only claim things to be *acceptable* to others if those things can be justified in terms that do not follow from a particular comprehensive doctrine of the “good” or “right”, but from “*public reason*”²⁰⁶, that is those principles that are acceptable from the perspective of all reasonable people simply in virtue of common human reason. In short, the exercise of political authority needs to be acceptable from the viewpoint of anyone, as long as they are reasonable. The “*criterion of reciprocity*”²⁰⁷ furthermore requires that when endorsing a view regarding fundamental constitutional essentials, one must believe that others could endorse that view too, that they can “reasonably be expected” to endorse it – otherwise one is not being reasonable.

The third and last specification relevant for reasonable acceptability is that citizens must be able to endorse constitutional essentials “*as*” free and equal. Put differently: What is acceptable to persons counts for legitimacy only insofar as it is acceptable for them *as* free

²⁰³ Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 54

²⁰⁴ See e.g. Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 54ff.

²⁰⁵ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 54.

²⁰⁶ See Rawls, John: The idea of public reason revisited., In: Rawls, John: Political Liberalism. Expanded Edition., Columbia University Press, 2005, p. 447 for an overview of how public reason relates to the idea of reasonable acceptability and the criterion of reciprocity.

²⁰⁷ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. xliv.

and equal. Persons not perceiving themselves as free, or as superior to others, could thus actually accept something that would nevertheless not contribute to legitimacy, because it is only through acceptance by people *as* free and equal persons that legitimacy can be established. When talking about acceptance, Rawls thus clarifies: “*they* [i.e. the citizens] *must be able to do this as free and equal, and not as dominated or manipulated, or under the pressure of an inferior political or social position.*”²⁰⁸ Only if this condition is satisfied, the criterion of reciprocity is properly realized.

I conclude that Rawls' conception of legitimacy relies on “reasonable acceptability” as a normative condition. The exercise of political authority must rely on fundamental principles that are acceptable to all subjects, provided they are reasonable (i.e. fair-minded and acknowledging reasonable pluralism as well as the genuine need for toleration) and perceived as free and equal. Vice versa, the exercise of political authority does not require the support of unreasonable people, their consent has no legitimizing force. In any case it is not actual consent or agreement to a constitution that matters to Rawls, but its acceptability, i.e. the potential for citizens' endorsement under certain ideal condition. This is his central measure of legitimacy.

2.3.2 Political justification

In the previous section I have explicated Rawls' conception of legitimacy based on the LP he formulates. The normative condition I thus developed is “reasonable acceptability”, an idea which relies on certain normative notions, the most significant being “reasonable pluralism” and the “criterion of reciprocity”. In the following I will outline an alternative line of argument, which also relies on those notions, but arrives at a normative condition that could be called “political justification”. In making this argument, more normative ideas have to be introduced, the most important being “political conception of justice” and “public reason”.

As a matter of fact, Rawls claims that in order for the use of political power to be legitimate, it has to be exercised in accordance with a “*political conception of justice*”. Several clarifications are in order to understand the meaning of this claim.

²⁰⁸ Rawls, John: *Political Liberalism.*, Columbia University Press, 2005, p. xlii

First, he states that political authorities must be guided by a *conception of justice*. The latter is defined as:

*“a set of principles for assigning basic rights and duties and for determining (...) the proper distribution of the benefits and burdens of social cooperation.”*²⁰⁹

What does this mean? It means that an authority ought to view society as a *system of cooperation*²¹⁰. In doing so, their subjects ought to be perceived as free and equal persons who in virtue of their two “*moral powers*” - “*a capacity for a sense of justice and for a conception of the good*”²¹¹ - are able to be fully cooperating members of that society²¹². Thus, for an authority to be guided by a conception of justice is for them to rely on a *moral conception* of the person, of how society should be regulated and in what way the members of that society ought to relate to each other. Quite obviously this understanding has implications for how the “burdens and benefits” of society ought to be distributed and how these decisions ought to be made.

However, while it is true for Rawls that any legitimate authority must rely on a moral conception of justice, it is also true that there is no consensus on a specific conception of morality. In fact, reasonable pluralism implies that such consensus is unachievable. There are two possible conclusions. Either Rawls could contend with arguing that in exercising political authority, politicians should live up to some professional ethics in the sense that they do not merely act “on a whim” but ascribe themselves to a conception of justice, whichever one it may be. In this sense, legitimacy would be realized as long as politics are regulated by *some* moral conception of justice. However, this is not the understanding endorsed by Rawls. Instead he opts for a second possibility: In order for the exercise of political authority to be legitimate, it has to be guided by a conception of justice that can be endorsed by all, regardless of their different fundamental convictions. How is that possible?

Rawls actually argues that people hold different “*comprehensive doctrines*”²¹³, i.e. they

²⁰⁹ Rawls, John: *A theory of justice*, Belknap, 1971, p. 5. Also see Scheffler, Samuel: *The appeal of political liberalism*, In: *Ethics*, Vol. 105, No. 1, 1994.

²¹⁰ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 15. Note that he usually talks about society as a “fair” system of cooperation, but I believe this term to be an explication of the specific version of a political conception of justice that he is defending, “justice as fairness”, and not to be an integral part of all political conceptions of justice.

²¹¹ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 19.

²¹² See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 18 and p. 20.

²¹³ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 12. Note that Iris Young has

ascribe themselves to convictions that make claims of what is “good” or “right” not just within any one context, but “in general”. Reasonable disagreement makes it impossible to agree on any one comprehensive doctrine. If we are to perceive persons as free and equal, however, it is wrong to impose something on them that they cannot accept; requirements cannot merely be “*externally imposed*”²¹⁴. As Freeman puts it: “*to be fundamentally free requires that we should be in a position to accept (...) the principles of justice regulating our basic social structure*”²¹⁵ This suggests that freedom is properly understood as autonomy²¹⁶ and it is a key thought of Rawls' thinking: If we take the concepts of freedom and equality seriously, that which is imposed on people has to be *acceptable* to them, because persons are free and equal only if they live their lives relying on conceptions that can be their own. Thus, the underlying moral claim is that authority and autonomy have to be compatible if the exercise of political authority is to be legitimate. But how can they be, given that the authority must be guided by a conception of justice, when at the same time there is no comprehensive conception of justice that is actually acceptable to all?

Rawls' answer appears simple: People need to live under an authority that allows them to remain autonomous. Autonomy requires that they are able to accept the political conception of justice that guides the exercise of authority. As Rawls puts it: “*full autonomy is realized by citizens when they act from principles of justice that specify the terms of cooperation they would give to themselves*”²¹⁷ No comprehensive conception of justice actually is acceptable in that sense. Hence, the conception of justice which can legitimately guide an authority must not be comprehensive. It must be “*political*” instead.

Political conceptions of justice are special, because while they do make moral claims, they do so only regarding one specific area of life – politics²¹⁸. They do not impose a complete

actually made a rather interesting objection against this presumption: “*I think that the idea of a comprehensive doctrine is too thin a concept to cover the facts of pluralism in ways of life in modern societies. No set of ideas, however comprehensive or systematic, usually defines (...) a way of life.*” (p.23) That is to say, reasonable people do not usually hold only one specific view that gives meaning to every aspect of their life, this would simply be a “too totalistic” view. There is more pluralism in any one person's value commitments than Rawls admits. [See Young, Iris: Rawls' Political Liberalism., In: Journal of Political Philosophy, Vol. 3, No. 2, 1995 for details.]

²¹⁴ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 98.

²¹⁵ Freeman, Samuel: Original Position., In: Stanford Encyclopedia of Philosophy, 1996 (online at: <http://plato.stanford.edu/entries/original-position/>, last visited 7 May 2011, 17:20)

²¹⁶ See Rawls, John: A theory of justice., Belknap, 1971, p. 252. Also see Freeman, Samuel: Original Position., In: Stanford Encyclopedia of Philosophy, 1996 (online at: <http://plato.stanford.edu/entries/original-position/>, last visited 7 May 2011, 17:20).

²¹⁷ Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 77

²¹⁸ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 11.

conception of morality²¹⁹; for example they do not say anything about how to make judgments in general or how to live a “good life” overall. Instead their claims only address persons in their capacity as political agents and subjects (as “citizens”) and leaves them free to endorse their personal beliefs of the “good” and “right” everywhere else. Thus, political conceptions are not comprehensive and they are also “freestanding”²²⁰ in the sense that they do not draw on comprehensive doctrines for their values and approach. Instead, they only draw on those values and approaches that are acceptable to people *regardless* of the fundamental comprehensive doctrines they affirm. This means that they are generated only from “*the fundamental ideas implicit to the public political culture*”²²¹, i.e. “*public reason*”.

Before turning to my conclusion, there is one more thing that has to be clarified: Rawls claims that authorities ought to be guided by a political conception of justice. This could be misconstrued easily, either by objecting against the term “justice” or “political”. It is important to note that while Rawls vehemently defends a distinction between justice and legitimacy, he also acknowledges their relation²²². That is to say, a legitimate authority needs to be guided by a conception of justice, but this does not mean that a legitimate authority by doing so is also just. The difference lies in the degree of realization, I think. More importantly, however, it lies in the substantiveness – justice requires a comprehensive conception, while legitimacy calls for the opposite, that is a freestanding political approach which does not make a claim on comprehensiveness. Now the obvious question is what makes the “political” conception of justice that, political, if the claims it makes are actually moral²²³. They are moral, because they tell us something about how persons, regarded as autonomous agents, should relate to one another – they ought to relate to one another in a way that they could justify in terms that are acceptable to all, as long as they are reasonable²²⁴. However, the conception is nevertheless political, because its claim is restricted to the political area, and so are its values. In fact the special condition of political decisions (that they are enforceable and bind everyone), is why this special sort of justification is required. For other spheres, different conceptions of moral conduct could be defended. As long as the focus is political, both scope

²¹⁹ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 13 for an overview of how “comprehensive” doctrines may in fact be seen to do that (but not political conceptions of justice).

²²⁰ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 12.

²²¹ Wenar, Leif: John Rawls., In: *Stanford Encyclopedia of Philosophy*, 2008 (online at: <http://plato.stanford.edu/entries/rawls/>, last visited on 24 April 2011, 16:49)

²²² See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, pp. 427ff.

²²³ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 11.

²²⁴ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 137.

and content of a theory of justice need to be restricted to what is reasonably acceptable to all.²²⁵

In a nutshell, the concept of persons as free and equal requires that political authority is justified. “*Since justification is addressed to others, it proceeds from what is, or can be, held in common*”²²⁶. However, since there is pervasive disagreement, and since this disagreement would persist even if all people were reasonable, the justification of authority cannot refer to any comprehensive conception of the “good” or “right”. It needs to be freestanding, but at the same time it must actually be acceptable to persons, who do in fact endorse various comprehensive doctrines. The solution is that of an “*overlapping consensus*”, a set of ideas and principles that is acceptable from the viewpoint of all reasonable doctrines. The only values that can be the focal point of this “overlapping” consensus are political values or “public reasons”, that is those values that allow persons to be free and equal and to cooperate in a social system perceived as a system of cooperation. All in all, a political authority is thus legitimate if it satisfies the normative condition of *political justification*, or (as Rawls calls it) “public justification”²²⁷.

2.3.3 Hypothetical consent

In the previous section I have shown how Rawls' criterion of reciprocity and his conception of the person as free and equal can be combined with his notion of “public reason” in order to explicate his conception of legitimacy. As we have seen, “acceptability” is strongly linked to the issue of justification and so while the central concepts of the two argumentations are virtually the same, some significant ideas were yet to be added. In the present section I present a third approach Rawls offers for determining the normative notion of legitimacy: the “Original Position”, which leads to the normative condition “*hypothetical consent*”.

As we have seen Rawls concentrates on the aspect of justified coercion, because he assumes that the main problem of politics, from a viewpoint of morality, is that reasonable people can be bound by laws they do not fully agree with. Since agreement is unachievable due to the

²²⁵ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 137.

²²⁶ Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 100

²²⁷ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 387ff. Note that I nevertheless use the term “political justification”, because I fear that “public justification” could be confused with Rawls' notion of “publicity” as used in his *Theory*.

burdens of judgment, we need a conception for how the exercise of political power can be justified anyway. Rawls suggests that since we cannot find agreement on particular policies, not even assuming that people are fair-minded and rational, the only acceptability we can hope to find is about the basic *principles* governing the authority's actions. But how do we find them, given that in reality not all people actually are reasonable, fair-minded and rational?

Rawls' solution is a hypothetical thought-experiment inspired by the social-contract tradition; the “*Original Position*” (OP). The underlying assumption is this: Our recognition of what is acceptable for persons regarded as free and equal is clouded by the actual inequalities that persist in real-life. That is to say, morally arbitrary facts²²⁸, such as differences in gender, wealth or education, shape our perception of interests and of the options available when it comes to issues of politics. It is likely that even if, despite all inequalities, we were fair-minded and determined to find a reasonable solution, any decision stemming from actual covenant would still reflect bargaining²²⁹. If we aim to find universally acceptable principles for guiding politics, we therefore need to abstract from those particularities.

This is why Rawls imagines a hypothetical situation, in which the representatives of all of the authority's subjects are under a “*veil of ignorance*”²³⁰, i.e. they know basic facts about human nature, life, etc., but they do not know anything particular about themselves or their social position. When assigned the task to find a conception of justice which would make the exercise of political power acceptable, one thing they know is that persons hold diverse convictions about what is actually right or just. Due to the fact that they don't know, however, what their particular beliefs are, they will not try to influence the decision as to rely on any one comprehensive doctrine. Instead, they will attempt to find principles which can be justified from “*common human reason*” alone; that is principles which are both reasonable and can be endorsed from all reasonable viewpoints. Their hypothetical consent would be for a “*political conception of justice*”, i.e. a conception of justice that relies for its sole source on values that can be found in the public political culture. It is guided by the fundamental acknowledgment of the freedom and equality of persons, and so it endorses the view that

²²⁸ See Freeman, Samuel: Original Position., In: Stanford Encyclopedia of Philosophy, 1996 (online at: <http://plato.stanford.edu/entries/original-position/>, last visited 7 May 2011, 17:20). Also see Rawls, John: A theory of justice., Belknap, 1971, p. 79.

²²⁹ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 23.

²³⁰ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 23. Also see Rawls, John: A theory of justice., Belknap, 1971, chapter 3.

society should be a fair system of cooperation²³¹. These ideas, Rawls suggests, can be the focal point of an “*overlapping consensus*”²³², that is agreement among all reasonable doctrines, because it only reiterates the very idea of reasonableness itself.

It also satisfies the “stability test”²³³ Rawls proposes. He argues that besides wondering what a legitimate conception of justice is, the parties in the Original Position also have to consider whether a society following that approach would actually be stable over time. He suggests that legitimacy indeed provides stability, because subjects would be able to “*justify their political decisions to one another using publicly available values and standards*”²³⁴. Since legitimate political authority can be justified in *terms* that are acceptable to all, in the terms of “*public reason*”, the exercise of political power would not be a problem for stability, because people would be able to accept and indeed endorse them²³⁵. Note that Rawls addresses legitimacy and stability as separate issues. In this sense, stability is not a condition of legitimacy, but a separate requirement for politics. However, he argues that the same principles ensure both, and so the fundamentals of his conception hold for both too – legitimacy as well as stability²³⁶.

2.3.4 Conclusion

In the previous sections I have given an outline of Rawls' fundamental ideas and how they can be combined in order to arrive at his normative condition of legitimacy. In fact, I have suggested that there are three possible ways to do so, all of which are indicated in his book “Political Liberalism”. The picture we get is this: Just as Simmons, Rawls starts off from a moral conception of the person as “free” and it is in this context that he frames the problem of legitimacy. Unlike Simmons, however, Rawls does not define freedom as being under no obligation, he rather formulates it as a conception of autonomy. On this view, people have a right to live under rules that can be their own. This does not mean that people are entitled to live only under those rules that they choose for themselves, or that they actually consent to,

²³¹ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 22. Also see Wenar, Leif: John Rawls., In: Stanford Encyclopedia of Philosophy, 2008 (online at: <http://plato.stanford.edu/entries/rawls/>, last visited on 24 April 2011, 16:49) for the argument that these are the three fundamental ideas.

²³² See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 149 and p. 164.

²³³ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 141.

²³⁴ Wenar, Leif: John Rawls., In: Stanford Encyclopedia of Philosophy, 2008 (online at: <http://plato.stanford.edu/entries/rawls/>, last visited on 24 April 2011, 16:49)

²³⁵ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 143.

²³⁶ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 64.

but what is relevant is that political authority can be justified to them in terms that are acceptable. This is significant for two reasons: On the one hand, it shows that legitimacy depends on justification. Only a certain sort of justification, however, makes for a legitimate authority. The justification needs to rely on reasons that are acceptable. They need to be acceptable, though, only to a certain set of persons – those that are reasonable. The terms in which such reasonable justifications can be given are “political” terms; that is they refer only to public values that can be the focus on an overlapping consensus. They do not require the support of any comprehensive doctrine. If the exercise of political authority is justified this way, it is compatible with autonomy, because by being reasonable any person can make the authority's guiding principles their own. The test for their reasonableness is whether people would adopt the same principles were they under a veil of ignorance. This impartial perspective is the one we ought to adopt when evaluating the legitimacy of any given political authority.

3. Evaluation

3.1 Reasonable acceptability

The exclusion of unreasonable subjects from the legitimization pool

As we have seen, Rawls' LP can be explicated to show that “reasonable acceptability” is the normative condition of legitimacy. In fact, David Estlund has come to the same conclusion and conceptualized it as the RAN-thesis, i.e. the “Reasonable Acceptance Necessary”-thesis. I believe it to be an immensely helpful formulation if we aim to evaluate the plausibility of Rawls' conception:

“No doctrine is admissible as a premise in any stage of political justification unless it is acceptable to all reasonable citizens, and it need not be acceptable to anyone else.”²³⁷

This is to say: For a political authority to be legitimate, its rule needs to depend on principles that are acceptable to all reasonable persons. What is more, the justification of those principles, too, must be possible on the basis of reasons that are acceptable to all reasonable

²³⁷ Estlund, David: The insularity of the reasonable. Why political liberalism must admit the truth., In: Ethics, Vol. 108, No. 2, 1998, p. 87

persons.

There are quite obviously two claims here and at first sight they seem to contradict each other: On the one hand, Rawls' implicit assumption is that the conception of the person as free and equal requires political authority to be compatible with autonomy. This would then suggest that no one should be subjected to a rule that is not acceptable to him/her. However, Rawls introduces a significant restriction to this claim when he argues that an authority's rule needs to be acceptable only to a certain set of persons: the reasonable ones. But what exactly does it mean for unreasonable persons to be excluded from the “legitimization pool”? Does it mean that they do not have a right to autonomy? Can an authority really be legitimate in that case?

Marilyn Friedman is quite clear in her judgment. She argues that if freedom grounds a right to autonomy, and if political autonomy consists in not having imposed a rule of law the essentials of which one cannot accept (or even more gravely: which one rejects)²³⁸ – then Rawls is definitely denying the autonomy of unreasonable persons²³⁹. In claiming to be liberal, that is in claiming to uphold the freedom of persons, a political authority would be imposing values on their disagreeing subjects and thus violate their freedom. Does that not defeat the whole purpose of liberalism, Friedman questions when she states: “*political liberalism (...) would impose its coercive power on the nonliberal persons who reject its legitimacy – just as those persons, if they had the chance*”²⁴⁰. What this criticism points to is the fact that if acceptability matters, why should it only matter with regards to some and not others?

Rawls does not make an explicit argument for why we can legitimately exclude unreasonable people from the legitimization pool. However, the underlying assumption would appear to be something like this: What matters is not acceptance, but acceptability. That what is acceptable is “acceptable to the reasonable” and it need not be more, because with unreasonable people you can not reason. We are not denying those people's autonomy, because autonomy does not require – as Simmons assumes²⁴¹ – actual acceptance, only acceptability. By being

²³⁸ See Friedman, Marilyn: John Rawls and political coercion of unreasonable people., In: Davion, Victoria/Wolf, Clark (Eds.): The idea of a political liberalism. Essays on Rawls., Rowman & Littlefield , 2000, p. 29.

²³⁹ See Friedman, Marilyn: John Rawls and political coercion of unreasonable people., In: Davion, Victoria/Wolf, Clark (Eds.): The idea of a political liberalism. Essays on Rawls., Rowman & Littlefield , 2000, p. 23.

²⁴⁰ Friedman, Marilyn: John Rawls and political coercion of unreasonable people., In: Davion, Victoria/Wolf, Clark (Eds.): The idea of a political liberalism. Essays on Rawls., Rowman & Littlefield , 2000, p. 31

²⁴¹ See the previous chapter on Simmons for an explication of his theory.

unreasonable, some people reject what is *actually acceptable*, but that does not mean that it actually is not acceptable for them. That is to say, by being unreasonable those people forego their right to have their acceptance count. Yet, just because the constitution is not justified *from their point of view* does not mean it is not justified *with regards to them*. They are treated as free and equal just as reasonable people are, it is just that their actual acceptance does not provide a reliable measure for what is universally acceptable and so “reasonable acceptability” is not dependent on what they believe to be acceptable.

Put differently: All reasonableness requires is for people to be fair and to respect the fact that other fair-minded persons may sometimes be of a different opinion than them when it comes to particular issues of justice or morality. Surely this is not too much to ask, is it? It is a condition that any person, regardless of their sex, race or age can satisfy and so it is not based on any morally arbitrary fact; all persons have the same chance of being reasonable. As a consequence, there seems to be no *prima facie* veto against making reasonableness a precondition for acceptability. Rawls claims that what is “reasonably acceptable” is actually acceptable to all reasonable as well as unreasonable people. The difference between the two groups is just that reasonable people accept that what is reasonably acceptable, while unreasonable people refuse to.²⁴²

Where does that leave us? Perhaps to exclude unreasonable people is still morally “grey”, because if persons are free and equal, of course it seems desirable that the “acceptable” can be defined with reference to what people actually accept, because then they can see for themselves that their autonomy is being realized. Yet, the problem with unreasonable people is that they refuse to adopt a “common” viewpoint, they only think about what they can accept, but not about whether this is acceptable to others too. Therefore, to include them, and have them influence the essential rules of social cooperation – those rules which fundamentally shape everyone's life-perspectives – and have them influence them based on an unfair mindset, would certainly be worse than excluding them, because if we are to impose unwanted rules on anyone, it should be on those who are “immoral”. Unreasonable people are immoral, in Rawls' assumption, because they *could* be reasonable, but they refuse to (consciously or not). Thus they forgo their right to consideration in matters of acceptance.

²⁴² Note that this conclusion may be controversial. In fact, Rawls never explicitly admits that “acceptance” by the reasonable is a measure for general “acceptability”. However, I agree with Habermas that Rawls needs to rely on this view to some extent. [Habermas argues that Rawls must allow an “*epistemic relation*” between the two, so that the validity of certain values is actually confirmed by public discourse. - See Habermas, Jürgen: Rawls' Political Liberalism., In: The Journal of Philosophy, Vol. 92, No. 3, 1995, pp. 122-6.]

This is why the restriction of the acceptability requirement to reasonable people is justified. In an ideal situation perhaps it would not even need to exclude anyone, because everyone does – in principle – have the option of being reasonable, and so anyone can be included if they will.

I imagine that this is what an argument against Friedman's criticism could go; not by rejecting the claim that there is indeed something unfortunate about excluding unreasonable people, but by arguing that it is the less-bad option (as compared to including them and arriving at unjust political conditions for everyone). Their exclusion is justified, because any legitimate authority still has to *consider* them. The constitutional essentials still have to be so that they could accept them were they reasonable, which means that for example their fundamental rights may not be violated. However, what unreasonable people are excluded from is the “measure” for acceptability. What is reasonably acceptable must be measurable (to some extent) according to what reasonable people accept. Note that it is not their actual acceptance that has normative force, but the universalized conception of acceptability we can deduce therefrom. Yet, while their acceptance is not the normative condition of legitimacy it still matters as a “safety net” for testing whether what is claimed to be reasonably acceptable actually is that. Unreasonable people are excluded in so far as their actual acceptance or rejection has no relevance for legitimacy at all. Now the question is whether this seems convincing.

In fact, I remain unsure. For example, Friedman has pointed out that reasonable persons are defined by a mindset that makes two sorts of requirements – persons will fair cooperation, but they also respect disagreement (at least within the group of fair-minded individuals). What if a person lives up to one of those requirements, but not the other?²⁴³ Is he/she actually unreasonable? And if they are not, who is to decide about the degree of “reasonableness” that people have to live up to? Pragmatic implementation of the acceptability requirement seems to prove more difficult than expected. In addition to that, Iris Young also objects that people seeming unreasonable might just be “poor reasoners”²⁴⁴, who, as a consequence of being inarticulate for example, are classified as unreasonable and hence illegitimately excluded from the legitimization pool. Moreover, Estlund has brought up another important objection:

²⁴³ See Friedman, Marilyn: John Rawls and political coercion of unreasonable people., In: Davion, Victoria/Wolf, Clark (Eds.): The idea of a political liberalism. Essays on Rawls., Rowman & Littlefield, 2000, p. 19.

²⁴⁴ See Young, Iris: Inclusion and democracy., Oxford University Press, 2002, pp.6-7.

*“It is not as if some people are reasonable and others are not (...). Rather, the usual view accepts that there is no person or set of persons whose objections are decisive regardless of the grounds or other merits of their objection.”*²⁴⁵

The problem he thereby points out is that *“no one is unfailingly reasonable”*²⁴⁶. Therefore it might actually be misguided to conceptualize the acceptability requirement in terms of “persons”, because it seems that on close examination, reasonable people can only be identified according to the ideas, values and doctrines they hold²⁴⁷. That is to say, reasonableness may well be defined as a “mindset”, but there is no way to classify this mindset but with reference to certain substantive concepts. This is because hardly anyone consciously *believes* they are being unfair, even when they are.²⁴⁸ So even if people were honest about whether or not they are being reasonable, I doubt this would be of any merit for the present case. In the end, what Rawls is talking about is not so much people's attitudes, but he is concerned with showing how some doctrines cannot be seen but to stand for unreasonableness. For example, a person endorsing the doctrine of sexism may well sincerely believe that they are actually being fair, but I suppose that Rawls would nevertheless reject that claim, because this doctrine is not compatible with the conception of persons as free and equal. Yet, this is the problem right there, because as Friedman puts it: *“In a nutshell, the problem is that the unreasonable persons who are excluded from Rawls's legitimation pool are defined as such by the rejection of certain ideas and values.”*²⁴⁹ If reasonableness is defined with reference to certain substantive values, then those values cannot be defended on the basis that they are reasonable, because that would be circular reasoning for sure. Reasonableness is meant to be an indication for whether or not a principle is properly

²⁴⁵ Estlund, David: The insularity of the reasonable. Why political liberalism must admit the truth., In: Ethics, Vol. 108, No. 2, 1998, p. 91

²⁴⁶ Estlund, David: The insularity of the reasonable. Why political liberalism must admit the truth., In: Ethics, Vol. 108, No. 2, 1998, p. 91

²⁴⁷ See Wenar, Leif: Political liberalism. An internal critique., In: Ethics, Vol. 106, No. 1, 1995, pp. 59-62 for some interesting observations on how and in which contexts Rawls uses the “reasonable” as a descriptive feature. He actually argues that Rawls is not fully convincing in how he connects his notions “reasonable persons”, “reasonable comprehensive doctrines” and “reasonable pluralism” and proposes an explication to remedy this hole in Rawls' theory. I do not find his clarifications particularly helpful for the present purpose, but believe it to be an important observation that Rawls uses “the reasonable” in rather different contexts and not always consistently explains their relation. Readers should therefore keep in mind that my own interpretation – that reasonable persons need to be defined, to some extent, by their holding certain doctrines, may be controversial. Wenar, for instance, makes the inverted argument that “reasonable doctrines” can only be defined by by reference to reasonable persons.

²⁴⁸ See Friedman, Marilyn: John Rawls and political coercion of unreasonable people., In: Davion, Victoria/Wolf, Clark (Eds.): The idea of a political liberalism. Essays on Rawls., Rowman & Littlefield , 2000, p. 29.

²⁴⁹ Friedman, Marilyn: John Rawls and political coercion of unreasonable people., In: Davion, Victoria/Wolf, Clark (Eds.): The idea of a political liberalism. Essays on Rawls., Rowman & Littlefield , 2000, p. 29

acceptable, but how can we determine what is reasonable if not with reference to what people accept?

Apart from this more analytical objection there is one even more fundamental problem: If reasonableness is defined with reference to the endorsement of certain beliefs, it is not neutral among persons. If it is not neutral, though, how can we shield it from illegitimate biases? To me it actually seems we cannot. If we are to define reasonable acceptability substantively, there is no way to ensure that biased or unjust values may not find their way in, because the reasonable acceptability condition is effective only for those prejudices which we *know* to be that.²⁵⁰ That is to say – in testing my beliefs for reasonable acceptability, I will only know to look out for those biases which I recognize as such. Other problematic aspects of my doctrines I may not even become aware of as long as I am convinced that I am being reasonable.

All in all I come to the conclusion that the intuition Rawls relies upon is appealing, but nevertheless problematic. “Acceptability” is a morally appealing normative criterion only if there is some moral test. “Reasonableness” seems innocent enough to hold as such, but only if we look past the fact that reasonableness cannot be measured unless it is attached to some external standard, such as what doctrine a person holds. However, defining an external, seemingly objective standard of reasonableness is risky, because it cannot be checked according to a “reasonable acceptability” test itself and so it remains uncertain whether the exclusion stemming therefrom is actually legitimate or not. As Tim Hurley put it: *“Comprehensive doctrines often generate their own (...) accounts of what is and is not reasonable”* and so what constitutes neutrality *“is precisely what provokes the fiercest disagreement”*²⁵¹.

Can there be a test to ensure the moral permissibility of Rawls' standard of reasonableness? This is what I will try to find out in the following sections.

²⁵⁰ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, pp. 134-5 for an argument why those are the less problematic biases.

²⁵¹ Hurley, Tim: John Rawls and liberal neutrality, In: *Interpretation*, Vol. 2, No. 2, 1999, p. 51

3.2 Political justification

The issue of liberal biases

In the foregoing section I have made an objection against Rawls' conception of legitimacy that is based on Estlund, Friedman and Young. What their criticisms have in common is that they question the justifiability of excluding unreasonable people from the legitimization pool. The reason for this is: From Rawls' LP we get the impression that “reasonable acceptability” is the normative condition of legitimacy. It can be taken to mean that the constitutional essentials of a political authority have to be acceptable to all reasonable subjects. Unreasonable people, however, may reject them, without this having any impact on the legitimacy of an authority. Now the problem is how to determine who those “unreasonable people” are. The only option available is to define them as those who hold “unreasonable views”; and this can only be defined with reference to certain values. But who is to define which values are decisive for the exclusion of people, who is to define which values no-one may reasonably object to? If we exclude the wrong people this would indeed seem to jeopardize legitimacy and so the discrimination between what is “reasonable” and what is “unreasonable” is more problematic than it first appears.

My aim in the present section is to show that there is indeed a distinct, but related problem *within* the sphere of the reasonable. That is to say, in the foregoing chapter I was concerned with problems that might arise from discriminating between “reasonable” and “unreasonable”. Now I will imagine that we accept Rawls' premise that those two spheres actually exist and can be properly distinguished. This leaves “acceptability from the viewpoint of all reasonable people” as the central normative notion of legitimacy. The focus is then on discrimination within the sphere of reasonableness, and I suggest we have to examine carefully how Rawls deals with this.

As a matter of fact, Rawls has put much more effort in dealing with what he calls “reasonable pluralism”, i.e. disagreement within the reasonable, than with mere pluralism, i.e. disagreement in general and especially between reasonable and unreasonable people.²⁵² The puzzle a political authority faces in regards to legitimacy is this: Not all that is reasonable is reasonably acceptable *to all*. What does this mean? It means that even among reasonable

²⁵² See Rawls, John: *Political Liberalism*., Columbia University Press, 2005, pp. 63-4.

people there is disagreement, because they may hold different comprehensive doctrines. Those are “reasonably acceptable” in the sense that they can be justified from a reasonable viewpoint. However, because there is more than one reasonable comprehensive doctrine, no reasonable comprehensive doctrine is actually acceptable to all people. Put differently, people cannot “*reasonably be expected*”²⁵³ to endorse any one specific comprehensive doctrine, even if it is reasonable, and this means that politics cannot depend on one. How do we solve this problem? It seems we need to find a view that is reasonably acceptable without being comprehensive. It is not sufficient that an answer is reasonably acceptable, it must be reasonably acceptable *to all*. In short, we need to find a view, that no-one can reasonably reject (or that cannot be rejected from the viewpoint of *any* reasonable comprehensive doctrine)²⁵⁴.

Rawls deals with this by directing his focus on the issue of justification: If constitutional essentials can only be defended by reference to a (reasonable) comprehensive doctrine, then the above condition is not satisfied: “*It is unreasonable for us to use political power (...) to repress comprehensive doctrines that are not unreasonable.*”²⁵⁵ Vice versa, if constitutional essentials can be defended from the viewpoint of all reasonable comprehensive doctrines, then the above condition is indeed satisfied. If this is to be possible, there needs to be an overlap, a focal point, of values or ideas that all reasonable doctrines have in common. Rawls therefore introduces the idea of a “reasonable overlapping consensus” which includes principles that are acceptable to all reasonable people from the viewpoint of all their different comprehensive doctrines. For legitimacy this has the following implication: Legitimacy is realized when the exercise of authority is reasonably acceptable to all, i.e. if the exercise of political authority can be justified from *each* of their views. As a consequence, only that which can be the focus of an “overlapping consensus” of all reasonable doctrines can function as an appropriate ground for political justification.

This argument indeed seems rather appealing, because as Young put it: “*The genius of the idea of overlapping consensus is that it resolves disagreement not by saying that some of the plural and incompatible comprehensive doctrines are wrong, but by limiting the influence of each.*”²⁵⁶ Nevertheless we seem to inevitably arrive at a question of substance again²⁵⁷,

²⁵³ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 137 for this formulation.

²⁵⁴ Note that the formulation of “reasonable rejection” is from the “*Theory*”.

²⁵⁵ Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 61

²⁵⁶ Young, Iris: *Rawls' Political Liberalism*, In: *Journal of Political Philosophy*, Vol. 3, No. 2, 1995, p. 28

²⁵⁷ See e.g. Dreben, Burton: *On Rawls and Political Liberalism*, In: Freeman, Samuel (Ed.): *Cambridge*

because what exactly is it that can actually satisfy this condition and be the focus of an overlapping consensus? Rawls argues that there is only one answer. The only values that are neutral enough so we can support them without endorsing any particular comprehensive doctrine are those that are “drawn from” and “addressed to” a democratic society²⁵⁸. In his own words: Only those values that are generated from “*the fundamental ideas implicit to the public political culture*”²⁵⁹ are candidates. That is to say, constitutional essentials have to be justifiable in the terms of *public* reasons, otherwise they are not reasonably acceptable to all. Rawls suggests that there are three fundamental ideas that satisfy this condition: the idea that society should be a (fair) system of social cooperation²⁶⁰, the idea that citizens are equal and the idea that they are free.²⁶¹ There are many reasonable interpretations of those ideas, and hence there is “reasonable pluralism”. A doctrine that rejects any one of those ideas, though, is not reasonable in any case.

There are two objections against this view. One thing that has quite often been criticized is that Rawls fails in his attempt to present a neutral and un-comprehensive content for public reason. While he explicitly states that his political liberalism is not to be understood as “comprehensive”²⁶² or even “Enlightenment”²⁶³ liberalism, this does not appear convincing to all.²⁶⁴ For example, Friedman has pointed out that Rawls' conception of neutrality is biased in favor of liberal values²⁶⁵ and hence far from being acceptable to all. On a similar note William Galston has questioned how Rawls even arrives at those principles. By arguing that political liberalism is based only on values that are implicit to the public political culture²⁶⁶, Rawls

Companion to Rawls., Cambridge University Press, 2003, p. 339 for an argument that Rawls' political principles are indeed substantive.

²⁵⁸ See Galston, William: Pluralism and social unity., In: Ethics., Vol. 99, No. 4, 1989, p. 113.

²⁵⁹ Wenar, Leif: John Rawls., In: Stanford Encyclopedia of Philosophy, 2008 (online at: <http://plato.stanford.edu/entries/rawls/>, last visited on 24 April 2011, 16:49)

²⁶⁰ Note that in this context the concept of a “well-ordered society” is also relevant, but I do not have time to go into detail here and I do not believe it is highly relevant for the purpose of this paper. For the sake of completeness it might be said that Rawls defines a well-ordered society as one in which “*everyone accepts and knows that the others accept the same principles of justice and (...) the basic social institutions generally satisfy and are generally known to satisfy these principles*”. [Rawls, John: A Theory of justice, Belknap, 1971, p. 5]

²⁶¹ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 61 and Wenar, Leif: John Rawls., In: Stanford Encyclopedia of Philosophy, 2008 (online at: <http://plato.stanford.edu/entries/rawls/>, last visited on 24 April 2011, 16:49).

²⁶² See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. xxix.

²⁶³ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. xl.

²⁶⁴ See Nagel, Thomas: Rawls and Liberalism., In: Freeman, Samuel (Ed.): Cambridge Companion to Rawls., Cambridge University Press, 2003 for a detailed description of the kind of liberalism Rawls endorses.

²⁶⁵ Friedman, Marilyn: John Rawls and political coercion of unreasonable people., In: Davion, Victoria/Wolf, Clark (Eds.): The idea of a political liberalism. Essays on Rawls., Rowman & Littlefield, 2000, p. 29

²⁶⁶ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 13.

presupposes a dubious form of “*collective self-understanding*”²⁶⁷. What he seems to claim is that all reasonable people *do* perceive themselves as free and equal and that they *do* perceive society as a fair system of cooperation, and this is why those are the fundamental principles that can be the focus of a reasonable overlapping consensus. Yet, this is highly unsatisfactory, considering that Rawls' whole point in revising his “*Theory*” is to make due for the fact that people do in fact disagree on views of morality. What is more, every single fundamental concept introduced by Rawls, the “reasonable”, the “political”, is defined by reference to those ideas. One would expect more justification for that and this is why I find his way of argumentation feeble at this point. It appears that Rawls' fundamental moral claim would be better understood in that people *ought* to view themselves and others as free and equal, they *ought* to treat society as a (fair) system of cooperation and they *ought* to structure political authority so that its exercise realizes these ideas. For him this means that political authority *ought* to have the form of a democratic constitutional democratic regime²⁶⁸. This of course, makes for a rather strong claim, and one that is in need of justification. Rawls does not provide for that, though (at least not explicitly), because he takes for granted a constitutional democratic regime²⁶⁹.

I conclude that Rawls' conception of legitimacy relies for its normative force on the notion of the “reasonable”. It is specified so that only what is “publicly” or “politically” reasonable can be acceptable *to all*. In order to specify the content of this, Rawls draws on three fundamental ideas which concern the person (as free and equal) and society (as a (fair) system of cooperation). Those ideas indeed seem appealing to me as the basis for the justification of authority. Yet I am unconvinced by how Rawls introduces and uses them.

3.3 Hypothetical consent

The social aspect of justification

In the foregoing sections I have examined Rawls' normative conditions “reasonable

²⁶⁷ Galston, William: Pluralism and social unity., In: *Ethics*., Vol. 99, No. 4, 1989, p. 113

²⁶⁸ See e.g. Rawls, John: *Political Liberalism*., Columbia University Press, 2005, p. 126.

²⁶⁹ See Gutman, Amy: Rawls on the relationship between liberalism and democracy., In: Freeman, Samuel (Ed.): *Cambridge Companion to Rawls*., Cambridge University Press, 2003. Note that Rawls' political conception of the person is developed for a democratic context. He talks about “citizens” rather than subjects because he envisages them as ultimately be the ones to exercise political power “as a collective power” (see Rawls, John: *Political Liberalism*., Columbia University Press, 2005, pp. xliii-xliv).

acceptability” and “political justification”. In this context I came to the conclusion that the underlying concepts and ideas are appealing, but that Rawls might presuppose too much. For example, he seems to accept as self-evident that there are unreasonable persons and he is unconcerned with how to practically identify them. He also takes too lightly the risk of biases within the definition of the reasonable, and it seems to me that his way of determining the relevant principles (by way of aiming for an overlapping consensus) is unconvincing too. In the present section I therefore turn to the one practical “test” he suggests as a tool for determining the appropriate principles of justice: the original position.

To be sure, the original position is a hypothetical device meant to help us abstract from circumstances that should not influence the conception of justice we adopt; from “contingencies”²⁷⁰ as Rawls calls them. The basic idea is that parties, all of which represent a citizen of a common political community, are put in a position where they have to come to an agreement which principles of justice should guide their political authority: “*In taking up this point of view, we are to imagine ourselves in the position of free and equal persons who jointly agree upon and commit to principles of social and political justice.*”²⁷¹ What makes the original position special, for example compared to classic “state of nature” arguments²⁷², is that the parties are only “representatives”²⁷³ and not envisaged as the actual subjects of that decision. That is to say, due to what Rawls calls the “veil of ignorance”, the agreement situation is “*fair among all the parties*”²⁷⁴, because they enter the bargaining process knowing only morally relevant facts about themselves and others, but not those that are arbitrary or “accidental”²⁷⁵ (for instance they do know about the general nature and aims of persons, but not the particular interest or talent of the individual they represent). This kind of equality makes it *rational*²⁷⁶ for the parties to be reasonable, that is to propose terms of cooperation that would be acceptable to anyone (as long as they are willing to accept reasonable terms of cooperation). The reason for this is the following: If I do not know in which position of society I will end up (for example privileged due to natural talent or not), then it is in my rational self-interest to aim for a decision that will leave me well-off in any case. This is the

²⁷⁰ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 23.

²⁷¹ Freeman, Samuel: Original Position., In: Stanford Encyclopedia of Philosophy, 1996 (online at: <http://plato.stanford.edu/entries/original-position/>, last visited 7 May 2011, 17:20)

²⁷² See e.g. Hobbes, Thomas: Leviathan. [e.g. Cambridge University Press Student Edition, 2007].

²⁷³ See e.g. Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 25.

²⁷⁴ See Freeman, Samuel: Original Position., In: Stanford Encyclopedia of Philosophy, 1996 (online at: <http://plato.stanford.edu/entries/original-position/>, last visited 7 May 2011, 17:20).

²⁷⁵ See Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 23.

²⁷⁶ See Freeman, Samuel: Original Position., In: Stanford Encyclopedia of Philosophy, 1996 (online at: <http://plato.stanford.edu/entries/original-position/>, last visited 7 May 2011, 17:20).

appropriate initial situation for a social contract, because whoever I end up being (or whoever the person I am representing ends up being), the terms of cooperation are acceptable to me. By abstracting from particular interests this way, I am adopting a “*common*” viewpoint and that is exactly the kind of viewpoint that we need to adopt when making collectively binding decisions²⁷⁷ – a viewpoint that all parties can share.

The function of the original position thus is to determine what can be “*put forward as good reasons*”²⁷⁸. It is meant to fulfill this function by putting people's comprehensive doctrines behind a veil of ignorance. As Rawls puts it:

*“This enables us to find a political conception of justice that can be the focus of an overlapping consensus and thereby serve as a public basis of justification in a society marked by the fact of reasonable pluralism.”*²⁷⁹

The outcome of this procedure is legitimate, because it is that which all would agree to under fair conditions provided they are rational and reasonable. Hypothetical consent is thus the normative condition of legitimacy²⁸⁰. But is it plausible? I believe there are two aspects that require assessment. One is whether the original position is *effective* as a tool for explicating the valid form of justification in the context of political authority. The other is whether the framework it provides for valid justification is *plausible*.

Regarding the first issue I have the following problem: Rawls argues that “*there seems no better way to elaborate a political conception of justice(...) from the fundamental idea of society as an ongoing and fair system of cooperation between citizens regarded as free and equal.*”²⁸¹ This means that, again, the key values are already in place before the parties engage in their reasoning. I am not sure whether this is really necessary – if the parties in the original position did not know anything about their position in society, would they not agree on treating citizens as free and equal anyway? I believe good arguments could be made to support this view, which is why I deem it unnecessarily specific of Rawls to presuppose those values without justification. That is, perhaps his argumentative framework would allow those

²⁷⁷ See Freeman, Samuel: Original Position., In: Stanford Encyclopedia of Philosophy, 1996 (online at: <http://plato.stanford.edu/entries/original-position/>, last visited 7 May 2011, 17:20).

²⁷⁸ Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 25

²⁷⁹ Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 25 (footnote 27)

²⁸⁰ Note that Rawls actually calls it “hypothetical agreement” (see Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 24), but I use the term “consent” because I believe it to be more fitting.

²⁸¹ Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 26

same principles, and justify them by presenting them as the *outcome* and not the premise of the procedure he proposes. On a similar note, Jürgen Habermas has criticized Rawls' argument from the original position in that:

*“the concept of the citizen as a moral person, which also underlies the concept of the fair cooperation of autonomous citizens, stands in need of a prior justification. Further, it needs to be shown that this conception is neutral toward conflicting worldviews and remains uncontroversial after the veil of ignorance has been lifted.”*²⁸²

Apart from that, I believe the original position is only partly effective as a justification device. It is supposed to function as a thought experiment that anyone of us can conduct in order to test the acceptability of the principles they defend. It tells us exactly what kind of considerations are legitimate and which contingencies we need to abstract from. In doing so, I believe it neither excludes too much nor too little, and as a result it is indeed practicable as a sort of “test” we can subject our considered convictions to. What it asks us to do is to put ourselves in other's shoes so to see whether they could bring up valid reasons for rejecting my claims. It thereby helps us to determine how to restrict our reasons to those that are acceptable to others and, hence, to make sense of the notion of “reasonableness.”

Yet, there is one thing I am actually doubtful about and it leads me to the second aspect of my examination. What I question is whether imagining oneself as a party in the original position will ever actually change anyone's mind about whether their own proposals are reasonable. That is to say, by conducting this sort of thought experimenting I put my convictions to an “acceptability test”. If I am sincere it is anything but impossible that it may sometimes lead me to discover prejudices that I was previously unaware of, or to discover that my convictions are too biased by my own particular interests and that I have to adapt my views in order to be able to make valid public claims. However, I doubt that I can actually rid myself from those biases as long as the process of justification remains only in my own head.

To put it differently: I believe the major strength of Rawls' approach is that he gives a persuasive account of what kind of reasons should form the basis of fundamental political decisions: the reasons “*we can share*”²⁸³. In addition to that, he also gives an account for how

²⁸² Habermas, Jürgen: Rawls' Political Liberalism., In: The Journal of Philosophy, Vol. 92, No. 3, 1995, p. 119. Note that Rawls has made an attempt to rebut this claim in his article “Reply to Habermas.” [In: The Journal of Philosophy., Vol. 92, No. 3, p. 138], but I did not find his arguments there all too convincing.

²⁸³ Note that I have borrowed this formulation from Christine Korsgaard although she uses it for a rather different

to determine those reasons: by adopting a “*common standpoint*”²⁸⁴. By embedding his conception of legitimacy in the social-contract tradition he is able to “*represent the predominantly social bases of justice*”²⁸⁵. Political decisions are collectively binding and therefore I deem it plausible that those decisions should be collectively justifiable too. At first sight, the OP seems appropriate, because “*rather than representing the judgment of one person, it is conceived socially, as a general agreement by members of an ongoing society*”²⁸⁶. The fundamental problem, however, is that this form of social engagement is strongly developed only on the hypothetical level. On the practical level, the equivalent would be his conception of “practical reason”.²⁸⁷ There, too, he makes a lot of effort to establish the necessity of shareable justification and to specify the sort of reasons that people may refer to. Yet the one thing that he does not demand is that people actually do engage in justification. It seems to me that the weakness of his theory is that “justifiability” is valued over the actual process of justification. Is it really plausible that all we have to do is be *able* to offer a certain sort of reasons? Or would not legitimacy require that we actually engage in a process of justification, that we do indeed offer reasons to those who we ask to live under the laws we propose?

Rawls' “duty of civility” demands that citizens are “*able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason*”²⁸⁸. Note that they need to be *able* to, they must not actually offer those reasons. I think this does not suffice if we take seriously the autonomy of persons. We need to be able to live under a constitution the essentials of which

argumentation (See Korsgaard, Christine: The reasons we can share. An attack on the distinction between agent-relative and agent-neutral Values., In: Social Philosophy and Policy, Vol. 10, No. 1, 1993.).

²⁸⁴ Freeman, Samuel: Original Position., In: Stanford Encyclopedia of Philosophy, 1996 (online at: <http://plato.stanford.edu/entries/original-position/>, last visited 7 May 2011, 17:20)

²⁸⁵ Freeman, Samuel: Original Position., In: Stanford Encyclopedia of Philosophy, 1996 (online at: <http://plato.stanford.edu/entries/original-position/>, last visited 7 May 2011, 17:20)

²⁸⁶ Freeman, Samuel: Original Position., In: Stanford Encyclopedia of Philosophy, 1996 (online at: <http://plato.stanford.edu/entries/original-position/>, last visited 7 May 2011, 17:20)

²⁸⁷ Note that in the present chapter I have only dealt with two conceptions of justification offered by Rawls (the original position and public reason). Rawls also proposes a third conception, “reflective equilibrium”, which constitutes a rather inductive approach. I have not dealt with it in this paper, because as Thomas Scanlon has helpfully pointed out, it is not a conception of justification that deals with principles but with persons. That is to say, the original position and public reason have in common that they “*describe the kind of considerations that can justify a claim about justice (or about constitutional essentials)*”. Reflective equilibrium, on the other hand, only suggests that a “*person has no reason to modify or abandon their judgments*”. [See Scanlon, T. M.: Rawls on justification., In: Freeman, Samuel (Ed.): Cambridge Companion to Rawls., Cambridge University Press, 2003, p. 140.] The point is that legitimacy refers to the justification of principles and not to persons being justified in holding certain views, which is why I have neglected the latter sort of justification throughout my evaluation.

²⁸⁸ Rawls, John: Political Liberalism., Columbia University Press, 2005, p. 217

are acceptable to us provided we are reasonable²⁸⁹. On Rawls' account, if I happen to disagree, I have to live with it or find a way to find it acceptable. If we are to exclude unreasonable people, and I believe it is plausible that we do, then the least we should offer them is justification. We need to explain to them why we deem them unreasonable and how we come to this conclusion. The only way to minimize the risk of illegitimate exclusion is giving them the chance to talk back. The duty of civility should not only be a duty of reasonable people to be able to reason among each other, but it should also include a duty to listen to those who are deemed unreasonable. How else could we ever discover potential biases?

Now some might say that Rawls' conception of legitimacy actually contains an account of deliberative democracy that requires us to do just that – reason, justify ourselves, engage in discussions. I agree that, on occasion, Rawls seems to imply this²⁹⁰. However, his approach nevertheless seems unsatisfactory in this context. First, because he may imply it, even presuppose it – but does not explicitly argue for it²⁹¹. Second, I still believe that the hypothetical element of his theory is predominant. It is far more often that he refers to people's being “able” to accept or justify or offer reasons, than that he actually demands we *do* just that. Last, I found that Charles Larmore has made an interesting argument when he observed that Rawls' idea of public reason may well be seen to stand for deliberative democracy, but that he neglects the difference between deliberation as a mode of discussion or a mode of decision making.²⁹² In effect, this suggests that even if Rawls' argument is to be read so that he encourages discussion in the public forum, this does not necessarily mean that those decisions are actually decisive. Put differently, there is a difference between *justifying* and *making* a decision.

Now, one objection is close to hand at this point. It may appear that I have attacked Rawls' preference for hypothetical arguments in general. Going down that road, one might conclude, that I was too harsh in my criticism of Simmons. His is a strong plea for actualness and particularity and this is exactly what I have argued for in the context of justification. We need to engage in actual reasoning with particular people in order to properly justify fundamental

²⁸⁹ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 98.

²⁹⁰ See espec. Rawls, John: *The idea of public reason revisited*, In: Rawls, John: *Political Liberalism*. Expanded Edition., Columbia University Press, 2005, for example. p. 448.

²⁹¹ See e.g. Gutman, Amy: *Rawls on the relationship between liberalism and democracy*, In: Freeman, Samuel (Ed.): *Cambridge Companion to Rawls*, Cambridge University Press, 2003 or Cohen, Joshua: *For a democratic society*, In: Freeman, Samuel (Ed.): *Cambridge Companion to Rawls*, Cambridge University Press, 2003 for descriptions of how Rawls uses democracy, but never explicitly justifies this.

²⁹² See Larmore, Charles: *Public Reason*, In: Freeman, Samuel (Ed.): *Cambridge Companion to Rawls*, Cambridge University Press, 2003.

political decisions. Why should that not hold for acceptance too? Why contend with things being “acceptable” and not call for “acceptance” (or consent) as a legitimizing condition? The answer can be found in my analysis of Simmons²⁹³: Acceptance can be morally invalid just as non-acceptance can be, because what matters normatively is whether it is justified. Moreover, Rawls' discrimination between reasonable and unreasonable people is sensible. Ill-willing people's non-acceptance should not have any effect on an authority's legitimacy. That is a plausible assumption and so the normative condition of “justifiability” *is* central, because the normative force of acceptance depends on its being justifiable on the basis of good reasons.

However, while it seems plausible that we should exclude unreasonable people from the “acceptance” pool, we must not remove them from the “justification” pool. Just because their justification is not properly “addressed” to us does not mean that we do not still have a duty to address them. There actually is a risk of bias in Rawls' conception of the reasonable itself and this is why justification matters. But it matters also because of the freedom of persons. To subject someone to an authority that he/she feels he cannot accept, even if we believe that he/she could were he/she just reasonable, is a morally serious issue. It may be legitimate, but this does not mean that unreasonable people forego their right to justification. So actualness and particularity do matter – but not for consent, rather for justification. Actual reasoning is a precondition necessary as a safeguard to ensure that constitutional essentials indeed are acceptable, at least potentially, to all. This is why I conclude that the OP is appealing as a hypothetical device, but not sufficient as a justification tool, because the social dimension of justification needs to be actual and particular if legitimacy is to be realized.

4. Conclusion

In the previous sections I have examined the normative conditions Rawls proposes for legitimacy. At first, I turned to the notion of “reasonable acceptability” and showed why I believe it to be problematic to distinguish between reasonable and unreasonable persons the way Rawls does. I believe it to be plausible and thus morally permissible that unreasonable person's acceptance or non-acceptance cannot be a measure for legitimacy and that they can therefore justifiably be excluded from the legitimization pool. I also agree with Rawls that this is not a violation of their autonomy. However, from a moral viewpoint to take seriously the

²⁹³ See the previous chapter on Simmons.

freedom of persons nevertheless makes it necessary that political justification must still be addressed to them. To engage in actual reasoning, even with those we deem unreasonable, is essential, because any substantial definition of “reasonableness” refers to values and ideas which we believe may not be rejected. This, however, bears the risk of undetected biases or prejudices and I do not see how we can identify those if not by taking seriously even the unreasonable's objections. That is to say, legitimacy may not depend on the unreasonable people directly, but it does depend on us finding a morally sound definition of the unreasonable so to ensure not to exclude the wrong kind of people

In fact, I developed a similar criticism in the context of Rawls' normative condition “hypothetical consent”: I argued that hypothetical thought-experiments can actually be helpful for making individuals make sense of the notion of reasonableness, because by adopting an impartial view, they can find out which reasons are properly “shareable” and can form the basis of political authority. However, I believe that Rawls is too optimistic when it comes to the results of sincerity – that is to say, if I sincerely believe my views are reasonable, looking for objections inside my head, even if I try to adopt an “impartial” view, will probably not change my mind, because my mind can only hold objections that I am already aware of. In short, I am unconvinced that the original-position-method makes a difference to what I take to be my considered convictions. This is to say, the conceptualization of the original position points in the right direction, because it makes us aware of the social basis of justice. However, this social aspect of justification needs to be realized on more than a hypothetical level.

I also analyzed the plausibility of Rawls' notion of “political justification” as a normative condition of legitimacy. As a matter of fact, legitimacy does not only depend on what is reasonable, but it depends on what “all” can reasonably be asked to endorse. He believes that there is an “overlapping consensus” among all reasonable comprehensive doctrines and this is the proper basis for the justification of political authority. In fact, the constitutional essentials may only rely on principles that can be derived therefrom. The content of the “overlapping consensus” is provided by what Rawls calls “public reason”, that is those values that can be drawn from the “public political culture” itself. He assumes there to be three central ideas: society being a (fair) system of cooperation and citizens being free and equal. However, it seems to me that those presuppositions hold only (if at all) against the background of a democratic regime. Rawls is not entirely clear on what status democracy has within his theory, although at times he seems to set it as a premise or even assume it as an outcome. I

believe this to be the central weakness of his approach, because his conception of legitimacy relies on substantive values that he does not explicitly defend.

All in all, I believe there are two major merits to Rawls' theory. First, he provides a plausible argument for why reasons matter (because they are what we can share so to justify political authority) and what kind of reasons legitimacy depends on (those reasons that we actually can share). In this sense his approach seems superior to that of Raz, because he too accounts for the normative force of reasons, but his explication is more plausible. Second, I find Rawls' understanding of freedom both compelling and plausible. Autonomy does not require that the only obligations we have are those that we are willing to accept, but it only requires that those obligations are reasonably acceptable to us, i.e. that they can be justified to us in terms that we can accept. Here I believe Rawls' theory to be superior to that of Simmons, because his notion of freedom is less totalistic and can account for the moral force of justification. Nevertheless, I also find that in this context there is a major weakness in Rawls' account, because he is too unconcerned with excluding “the unreasonable” at the risk of biases.

In the following I will turn to the work of Fabienne Peter in order to find out whether this weakness can be remedied if we make an explicit claim for deliberative democracy, a concept hinted at by Rawls but not actually defended and argued for yet.

VI. FABIENNE PETER

1. Legitimacy via procedure

In the present chapter I will deal with the conception of legitimacy presented by Fabienne Peter. Concentrating on her book “Democratic legitimacy” I first explicate the framework and premise of her theory, then I turn to evaluate the plausibility of her argumentation. Since Peter's work can be seen to continue Rawls' thinking, the aim is to evaluate whether and to what extent she succeeds in making good for the weaknesses of this theory. This means that the focus will be on her condition of legitimacy and especially on the role of reasons and justification therein.

I proceed by firstly giving an overview of the main points of Peter's theory. Although she explicitly states that her book does not contain a description of authority I will analyze her underlying assumptions regarding the nature and status of legitimate political authority. Following that, I then give an overview of the normative condition she proposes for legitimacy. She calls her conception “Pure Epistemic Proceduralism” and my aim is to explicate what exactly she has in mind when she argues that legitimacy is satisfied only if politics are conducted according to certain democratic procedures. This means that I will outline the conditions of “political equality” and “epistemic fairness” that are essential for her condition of legitimacy. Note that this part will be describing the content rather than the argumentation of her theory, because the latter will be dealt with in the evaluative sections that follow.

In my analysis I suggest that Peter's conception of legitimacy is built on three succeeding stages of argument. First, she argues that legitimacy ought to apply to procedures rather than

directives. Second, those procedures need to be of a certain kind if we take seriously the fact of “reasonable pluralism” discovered by Rawls. Third, she assumes that this makes democracy a necessary condition of legitimacy. In evaluating the first two claims I will have to keep in mind the objections brought forward against Rawls, because one of the leading questions will be whether her explicit proceduralism is actually more convincing than Rawls' focus on constitutional essentials. Also I assess whether the moral demands embedded in the procedures proposed by Peter are actually convincing. Turning to the third part of her argument I then question whether she manages to justify why democracy is necessary for legitimacy.

2. Peter's theses on legitimate authority

2.1 Definition of legitimate authority

Right to rule correlating with obligation on part of the subjects

In dealing with Fabienne Peter's conception of legitimacy, I will focus on her book “Democratic legitimacy”²⁹⁴ and a related article, “Pure Epistemic Proceduralism”²⁹⁵, that was published a year before that. The first thing that has to be noted is that Peter's aim is not to give an account of the nature and status of legitimate authority. That is to say, unlike Raz or Simmons she does not make an effort to define exactly what distinguishes a legitimate from other authorities, or how the legitimacy of that authority's rule changes the normative situation of their subjects. Her explicit focus is the normative condition of legitimacy, not so much its implications. This is important, because it means that the following outline relies on those few remarks on authority that she does make, but not on extensive argumentation. Right at the beginning of her book she actually states:

*“Over and above the broad concern with moral standards for evaluating the legitimacy of political authority and political obligation (...), the narrower focus of the current debate is on the standards that apply to (...) decision-making.”*²⁹⁶

²⁹⁴ See Peter, Fabienne: Democratic legitimacy., Routledge, 2009.

²⁹⁵ See Peter, Fabienne: Pure Epistemic Proceduralism., In: Episteme, Vol. 5, No. 1, 2008.

²⁹⁶ Peter, Fabienne: Democratic legitimacy., Routledge, 2009, p. 2

With this restriction she sets the agenda for her book, limiting it to the defense of certain normative conditions, without thereby going into detail about what conception of authority she endorses. This, however, is not to say that she does not nevertheless rely on one, because what she assumes is that the “*concept of legitimacy qualifies political authority, the right to rule*”²⁹⁷ and that, in turn, “*gives people a binding reason to support or not challenge (...) the resulting decisions*”²⁹⁸. So legitimate authority consists in a right to rule and this correlates with the subjects' duty to accept that right and to “*act accordingly*”²⁹⁹.

The reason for her not going into detail at this point is this: In normative political theory there are three fundamental concepts – the right to rule, obligation and legitimacy. Most theorists actually embrace the understanding endorsed by Peter, that all three of them are connected. However, theorists differ in what they believe to be the most fundamental concept of the three. That is to say, the approach and conceptualization of their relation is different depending on what notion one starts out from. For example, one could argue that what “*counts as a legitimate authority depends on the political obligations people have*”³⁰⁰. This would mean to adopt “obligation” as the essential concept. Alternatively, some argue that “*political authority defines obligations and is separate from and prior to concerns with legitimacy*”³⁰¹. This suggests that the right to rule is fundamental. Peter actually opts for the third approach and relies on the idea that “*legitimacy is the fundamental concept that grounds both authority and obligations*”³⁰². On this view, a political authority needs to satisfy certain normative conditions in order to count as legitimate. If it is legitimate, it holds a right to rule, while the subjects are under an obligation to respect that rule. This makes the normative conditions of legitimacy central for any moral approach to political authority.

²⁹⁷ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 56

²⁹⁸ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 56

²⁹⁹ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 57

³⁰⁰ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 57 (Note that Peter cites Ronald Dworkin as an example.)

³⁰¹ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 58 (Note that Peter cites John Simmons as an example.)

³⁰² Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 58

2.2 Normative condition of legitimacy

Democratic procedures that realize political equality and epistemic fairness

As we have seen, Peter views the normative condition of legitimacy as the central moral issue regarding political authority. This means that her aim is not to give an account of the implications legitimacy has for the authority itself, or the subjects faced with it, but it is about explicating those normative conditions that apply to politics. Note that Peter actually frames the question of legitimacy as follows: “*What normative conditions should apply to democratic decision-making?*”³⁰³ Accordingly, legitimacy is defined as a “*set of conditions that applies to the evaluation of democratic decision-making*”³⁰⁴.

What this goes to show is that Peter, just as Rawls³⁰⁵, develops her theory for a democratic background. Her question is not what makes political decisions legitimate, but what makes *democratic* decisions legitimate. I will come back to this point later when I evaluate the plausibility of her argument, but for now I will proceed the same way I did with Rawls. That is, I will try to generalize her argument so that when she talks about democracy I will imagine she refers to politics more generally. For example, instead of legitimacy being defined as a normative concept meant to morally justify democratic decisions, I will treat it as to deal with *political* decisions.

Now, what exactly is that “*set of conditions*” that Peter envisages for legitimacy? In fact, she claims that a decision is legitimate “*if it is the outcome of a decision-making process that satisfies certain conditions of political and epistemic fairness*”³⁰⁶. She calls this conception “Pure Epistemic Proceduralism” and I believe there are three major aspects to this.

First, Peter classifies her conception as “*proceduralist*”. This means that political decisions are legitimate if they are the “*outcome*” of a certain kind of process. It is not the authoritative directives which have to live up to the normative conditions of legitimacy, but it is the process that generates them. A political decision is legitimate *as* and *because of* being the outcome of that process, not because it itself satisfies any external criteria. The normativity does therefore

³⁰³ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 1

³⁰⁴ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 2

³⁰⁵ See the preceding chapter on Rawls for details.

³⁰⁶ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 3

not reside in the outcome itself, but in its evolution³⁰⁷. That is to say, we are not to evaluate the content, but the process of politics.

In addition to that, Peter's account is not only "proceduralist" but "*purely* proceduralist" in nature and this means that there is no standard of legitimacy independent of that process³⁰⁸. As a consequence, the legitimacy of the process can not be evaluated with reference to its outcomes. This point is of special importance to Peter, because she thereby rejects "instrumentalist" accounts of legitimacy³⁰⁹. Those, too, are known to argue that legitimacy requires certain procedures for making political decisions. However, their demand for those procedures depends on them believing that it will somehow lead to the "best" possible outcomes. For example, Richard Arneson³¹⁰ defends democracy on the basis that those procedures will lead to "maximum fundamental rights fulfillment"³¹¹ and since this is what matters most for justice, democratic procedures and the decisions stemming therefrom are legitimate. Beyond rejecting this kind of instrumentalism, Peter also objects to "rational proceduralist" accounts of legitimacy. Those focus on political procedures, but they also adopt a second category of conditions, which are meant to apply to the outcomes themselves. As Peter puts it, "*In Rational Proceduralist conceptions, legitimacy depends not just on an appropriately justified decision-making process, but also on some standards of justification that target the decisions themselves.*"³¹² Thus, the "*quality*"³¹³ of outcomes still matters independent from the generating process and this is what Peter disagrees with.

So far all we know is that legitimacy depends on political procedures. More specifically, though, legitimacy depends on decisions being the outcome of an "*appropriately constrained*"³¹⁴ process. But what exactly are those constraints? Peter's answer is this: "*Pure Epistemic Proceduralism requires public deliberation among members of the democratic*

³⁰⁷ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 123.

³⁰⁸ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 35.

³⁰⁹ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, pp. 62-65 and Peter, Fabienne: *Pure Epistemic Proceduralism*, In: *Episteme*, Vol. 5, No. 1, 2008, p. 35 for her critique.

³¹⁰ See Arneson, Richard: *Defending the Purely Instrumental Account of Democratic Legitimacy*, In: *The Journal of Political Philosophy*, Vol. 11, No. 1, 2003 and Arneson, Richard: *Democracy is not intrinsically just*, In: Dowding, Keith / Goodin, Robert E. / Pateman, Carole (Eds.): *Justice and Democracy. Essays for Brian Barry*, Cambridge University Press, 2004. Note that he does not use the term "legitimacy", but I have nevertheless used it to make the contrast between his and Peter's approach more obvious.

³¹¹ See e.g. Arneson, Richard: *Defending the Purely Instrumental Account of Democratic Legitimacy*, In: *The Journal of Political Philosophy*, Vol. 11, No. 1, 2003, p.123.

³¹² Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 92

³¹³ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 65.

³¹⁴ Peter, Fabienne: *Pure Epistemic Proceduralism*, In: *Episteme*, Vol. 5, No. 1, 2008

constituency under conditions of political equality and epistemic fairness.”³¹⁵ Thus, there are actually four requirements: deliberation, democracy, political equality and epistemic fairness. If we combine condition one and two this suggests that Peter advocates an account of deliberative democracy. This is important because as Joshua Cohen put it once: “*deliberative accounts of democracy highlight the importance of public discussion prior to a vote*”³¹⁶. This is also the view endorsed by Peter, because she argues for both an aggregative and deliberative dimension of democracy. Deliberation is what confers normativity, but the aggregative dimension of democracy is still necessary in order to come to a decision in the face of disagreement. That is to say, because of reasonable pluralism consensus is impossible³¹⁷. Even public deliberation that satisfies the conditions of legitimacy “*cannot transcend pluralism*”³¹⁸. This is why voting is still necessary. It is, however, to be preceded and accompanied by public deliberation. This deliberation is what Peter's condition of legitimacy actually refers to.

First, deliberation is to be conducted “*among free and equal participants*”³¹⁹. This is what the condition of political equality requires. It demands us to “*acknowledge each other as equals*”³²⁰, thereby prescribing a certain conception of the person (at least within the political context). Practically speaking, it demands that people have an equal “*opportunity to participate in public deliberation*”³²¹. This is to say, giving people an equal right to vote is not sufficient, they actually need to be able to make use of that right. To put it differently: Formal inclusion is not enough, there also needs to be a fair chance to effectively participate³²². Moreover, an equal right to vote does not suffice if people do not also have a chance to engage in the public discussions that set the political agenda. Peter's call for political equality actually goes along with her “condition of reciprocity”: Persons are to recognize each other's capacities and accept that “*all have an equal right to use these capacities*”³²³. All are capable of participating in politics, hence all have an equal right to do so.

Second, the required deliberation ought to be public. As Peter points out, this is relevant in

³¹⁵ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 132

³¹⁶ Cohen, Joshua: *Deliberation and democratic legitimacy*, In: Bohman, James/Rehg, William (Eds.): *Deliberative democracy*. MIT Press, 1997, p. 72

³¹⁷ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 4

³¹⁸ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 34

³¹⁹ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 140

³²⁰ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 36

³²¹ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 36

³²² See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 37.

³²³ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 38

two distinct ways: *“Publicity is not just about giving one’s reasons in public, as opposed to deliberating privately, but affects the types of reasons given.”*³²⁴ And further: *“what renders reasoning public is not simply the form in which it takes place, but the accessibility of the reasons given for a particular view to people who might not share that view.”*³²⁵ Thus, there ought to be a public (instead of private) process of reasoning. This in turn means that the process of justification is viewed as social, not individual. It can only be social, though, if two conditions are satisfied. On the one hand, the process needs to be actual. People need to engage in an actual process of justification with each other; a process where there is *“public discussion and the exchange of reasons”*³²⁶. They are expected to *“voice and justify the reasons for which they prefer particular social states and their justifications are scrutinized by the participant discussants”*³²⁷. On the other hand, people can only rely on a certain sort of reasons when aiming at public discussion. This is because only if *“reasons are of a form that makes them potentially accessible to others”*³²⁸ they can form a legitimate basis of political decisions. Note that Peter declares this as a procedural interpretation of Rawls’ idea of public reason³²⁹.

This third aspect of deliberation is what Peter deals with under the heading of “epistemic fairness”. She argues it *“relates to people’s opportunity to contribute to the constructive function of deliberative decision-making”*³³⁰. That is to say, epistemic fairness requires not just that there is deliberation *“over given policy proposals”*³³¹, but the process of fact-gathering and policy-formulation also needs to be inclusive. All persons need to be granted *“access to consultational stages of the policy-making process”*³³². Fairness can thus be understood as equal effective opportunity, just as within the context of political equality. The epistemic aspect comes into play when Peter acknowledges that politics is not only a mode of problem-solving, i.e. a process to pick the best solution for social issues. It is instead a cognitive process too. Discussion need not only be conducted about how to solve a problem, but also about what the problems are – this is what epistemic fairness requires³³³. Diverse

³²⁴ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 33

³²⁵ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 33

³²⁶ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 4

³²⁷ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 32

³²⁸ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 33

³²⁹ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 5. See the preceding chapter on Rawls for an analysis of Rawls’ own use of the concept of public reason.

³³⁰ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 91

³³¹ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 126

³³² Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 126

³³³ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 126.

reasons matter to people. Only if all of them are considered epistemic fairness can be realized.

To sum up: Peter argues that legitimacy depends on whether and to what extent the political decision-making process realizes the conditions of political equality and epistemic fairness. Both of those conditions are seen to require public deliberation and the exchange of reasons. Public deliberation is required by political equality, because people need to have an equal chance to actually take part in the political process. At the same time, public deliberation is required by epistemic fairness, because the social process of reasoning enables a learning-process that is relevant for defining and solving social problems. Peter suggests her account calls for deliberative democracy, because this is how the conditions of “Pure Epistemic Proceduralism” are realized. The question is: How plausible are her claims?

3. Evaluation

3.1 Pure proceduralism

As we have seen, Peter's theory relies on the assumption that all of legitimacy's normativity stems from political procedure. Decisions are binding as and because of being the outcome of a certain procedure, not because they themselves satisfy any procedure-independent criteria. In making this argument, she rejects instrumentalist as well as rational proceduralist accounts of legitimacy. The former appeals only to substantive conditions for legitimacy, the latter has its focus on procedure but also demands that political decisions themselves are tested for legitimacy. Peter objects to this, and I believe her argument rests on two claims. First, Peter argues that if we appropriately design and constrain the political procedure in question, there is actually *no need* for further constraints, because those could not confer any additional normative force to the outcome. Second, she argues that substantive criteria are problematic, and indeed more problematic than procedural constraints. This is because the latter are actually more likely to be reasonably acceptable than the other, given the fact of reasonable pluralism. In what follows I will examine both claims in order to find out how convincing they are.

3.1.1 "Procedure-independent standards do not add to the normativity of political decisions."

In her article "Democratic legitimacy without collective rationality" Peter argues that the reasons for which some think that substantive criteria for legitimacy matter actually do not hold, because they can *"also be covered by procedural criteria"*³³⁴. This suggests that procedure-independent standards are rejected, firstly, because they are not necessary. Whatever we believe to be relevant values in regard to legitimacy, they can be implemented as a procedural constraint and need not be applied to the outcomes themselves. Peter actually gives two examples.

When analyzing Kenneth Arrow's collective rationality requirement she suggests that it is *"based on the claim that majoritarian voting may otherwise lead to manipulable (...) results"*³³⁵. She thereby refers to his discovery of the paradox of voting³³⁶, which William Riker has interpreted to suggest that democratic decisions are manipulable, because decisions depend on the way and order in which the agenda is set³³⁷. Arrow concluded that since legitimacy cannot rely on arbitrary outcomes, political decisions should themselves be tested in regard to their rationality. The underlying assumption is that we can detect manipulation best if we look at the consistency of outcomes³³⁸. Now Peter argues that while it is plausible that manipulation is not compatible with legitimacy, this does not explain why we should adopt rationality (or consistency) as an independent standard for testing outcomes. As she puts it: *"if a decision has come about as a result of manipulation, does that not by itself constitute a reason for doubting the legitimacy of the decision?"*³³⁹ That is to say, if our reason for excluding "irrational" outcomes is an unjust (i.e. manipulative) procedure, then irrational outcomes could be avoided simply by designing the procedure appropriately. If the procedure is fair there is no need for a rationality requirement and hence the substantive criterion of consistency does not confer normativity that could not be captured by an appropriately

³³⁴ Peter, Fabienne: Democratic legitimacy without collective rationality., In: De Bruin, Boudewijn/Zurn, Christopher (Eds.): New waves in political philosophy., Macmillan, 2009, p. 154

³³⁵ Peter, Fabienne: Democratic legitimacy without collective rationality., In: De Bruin, Boudewijn/Zurn, Christopher (Eds.): New waves in political philosophy., Macmillan, 2009, p. 151

³³⁶ See Arrow, Kenneth: Social choice and individual values., Yale University Press, 1963.

³³⁷ See Riker, William: Liberalism against populism., Freeman, 1982.

³³⁸ See Peter, Fabienne: Democratic legitimacy without collective rationality., In: De Bruin, Boudewijn/Zurn, Christopher (Eds.): New waves in political philosophy., Macmillan, 2009, pp. 143-5 for her argument why rationality is best understood as consistency in this context.

³³⁹ Peter, Fabienne: Democratic legitimacy without collective rationality., In: De Bruin, Boudewijn/Zurn, Christopher (Eds.): New waves in political philosophy., Macmillan, 2009, p. 154

constrained procedure. This, Peter concludes, is why we do not need to submit political decisions to procedure-independent tests.³⁴⁰

The second argument she gives is actually a little less straight-forward, because it concerns the actual content of policies. That is to say, most people believe in the necessity of an external standard for the legitimacy of political decisions, not so much because they are worried about potential manipulation or arbitrariness, but because they are worried that any procedure may lead to gravely unjust results. For example, some object to majoritarian voting procedures, because they fear for the rights of minorities. What if, for example, a democratic constituency votes for sexist policies? Even if democratic procedures are fair, for example in that they allow women to vote, there seems to be no safeguard against this, and that is why procedure-independent standards are necessary. Peter actually rejects this claim in that she argues: “*If the procedure is genuinely fair, one would (...) not expect a sexist proposal to go through*”³⁴¹. That is to say, certain outcomes are not simply the unfortunate outcome of a good procedure, but an indication for a “procedure gone wrong”³⁴². Of course we *can* disqualify those outcomes themselves, but we actually do not need to, because we can simply reexamine the constraints applied to the procedure itself, thereby achieving the same result. Note that this implies that the procedure has to be of a certain sort, because it has to allow for a “feedback-loop”, a learning-process that puts decisions under scrutiny even after they are made. Peter accepts this implication³⁴³, and in fact embraces it because it goes to prove her point that procedural constraints are sufficient to ensure the legitimacy of political decisions.

Thus, Peter's conclusion is this: Substantial requirements *can* be applied to the outcomes, but they do not add any normative force, because the legitimacy they can provide could also be achieved through the right sort of procedure. This is why she argues for procedural constraints rather than procedure-independent tests. In my view, her argument is convincing. She does not argue that just any procedure renders its outcomes legitimate, but she argues that if a procedure is appropriately designed it can. If it is, then there is no need for additional, procedure-independent tests. So far, so good. The question that has not yet been answered is *why* we should adopt procedural constraints *rather* than substantial ones. All that Peter's first

³⁴⁰ Note that Peter's evaluation of Arrow's theory is of course much more comprehensive and detailed than this. I have only picked out one line of argument in order to illustrate her thinking.

³⁴¹ Peter, Fabienne: Democratic legitimacy and proceduralist social epistemology., In: Politics, Philosophy and Economics, Vol. 6, No. 3, 2007, p. 346

³⁴² See Peter, Fabienne: Democratic legitimacy and proceduralist social epistemology., In: Politics, Philosophy and Economics, Vol. 6, No. 3, 2007, p. 346.

³⁴³ See Peter, Fabienne: Democratic legitimacy., Routledge, 2009, p. 111.

claim has stated is that if we design procedures correctly, we do not need additional standards. But why would we choose to impose constraints on the procedure in the first place, instead of dealing with the political decisions themselves? This is the question her second argument seeks to answer.

3.1.2 "Procedure-independent standards are less reasonably acceptable than procedural constraints."

So far I have given an outline of Peter's claim that procedure-independent standards for evaluating the legitimacy of political decisions are unnecessary, because they cannot confer any additional normative force. Her second claim goes even further, because she suggests that not only can those criteria not add anything, they are also less desirable from a moral perspective. That is to say: *"procedural reasons, surely, can be "publicly agreeable" reasons; in fact they are much more likely to be publicly agreeable than reasons that refer to the substantive content of a decision"*³⁴⁴. So the underlying assumption seem to be something like this: First, standards of legitimacy need to be "publicly agreeable" or, in other words, "reasonably acceptable". Second, standards that apply to political procedures are more likely to satisfy this condition than those which apply to policies or the decisions themselves.

I actually accept the first claim, because it seems to be very similar to the thoughts I have already discussed at length in the context of Rawls' theory. People ought to be able to accept the rules under which they are asked to live, because otherwise it seems their freedom or autonomy is violated³⁴⁵. Now the more interesting issue is what exactly this acceptability requirement applies to. Rawls' idea of public reason is actually open to interpretation and while I myself have adopted a procedural view, assuming that his principle of legitimacy applies only to the macro-level of politics, his writing is not unambiguous³⁴⁶. In contrast, Peter's claim is much more explicit and indeed a bit narrower, because her standards of legitimacy are applied to decision-making procedures only, not to the broader set of "constitutional essentials".

³⁴⁴ Peter, Fabienne: Democratic legitimacy without collective rationality., In: De Bruin, Boudewijn/Zurn, Christopher (Eds.): New waves in political philosophy., Macmillan, 2009, p. 153

³⁴⁵ See the preceding chapter on Rawls for a detailed discussion.

³⁴⁶ See Peter, Fabienne: Democratic legitimacy., Routledge, 2009, pp. 92-100 for an outline of the "substantive" and "procedural" interpretation of Rawls' idea of public reason.

Another aspect of Peter's claim is therefore more interesting. She does not argue that her constraints on procedures are not in fact substantial. All she suggests is that applying substantive requirements to procedures instead of decisions is more likely to live up to the acceptability requirement. Why is that? What she seems to assume is that people are more likely to accept certain values or norms when they are applied to the process of decision-making rather than on the decisions themselves. For example, so her thought seems to go, they would be more likely to accept “an equal say” in decision-making than “equal distribution” of certain resources. The underlying idea of both proposals is “equality”, which is a fundamental moral value. However, interpreting it as a procedural constraint, an imperative for how we should make collectively binding decisions, seems more likely to be accepted by people than interpreting it as calling for particular (distributive) policies. I actually find this idea intriguing. It is true that Peter could make a more extensive argument for this, but on an intuitive level it is certainly appealing.

Remember that in the context of Rawls' theory I have criticized that he presupposes substantial values as the content of public reason, more particularly that he builds his conception on the notion of “*free and equal*” citizens and society as a “*fair system of cooperation*”³⁴⁷. The thing I was puzzled by was where those values came from. He started out from the fact of reasonable pluralism, defended the need for an overlapping consensus and finally concluded that these values are the content of public reason. The question I was left with was: Why? Where did those values come from? Why are they the content of public reason? How do we confirm they actually are the focus of an overlapping consensus? Peter does not answer those questions, but I find that she chooses an elegant path to circumvent the problem. This is because she does not deny that the values she imposes are fundamental – she *does* demand substantive equality for example³⁴⁸. She does not deny that viewing persons as “free” and “equal” is a fundamental moral claim about how we *ought to* view or treat persons. The point is that she does not need to deny this, because what she assumes is this: Even in the face of pervasive disagreement, politics need to be constrained by certain moral requirements so to avoid violating justice. It is true, that this is difficult or problematic, because pluralism is (at least in part) reasonable³⁴⁹ and so we cannot claim or expect that all people will agree on

³⁴⁷ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 22. Also see Wenar, Leif: John Rawls., In: *Stanford Encyclopedia of Philosophy*, 2008 (online at: <http://plato.stanford.edu/entries/rawls/>, last visited on 24 April 2011, 16:49) for the argument that these are the three fundamental ideas.

³⁴⁸ See e.g. Peter, Fabienne: Democratic legitimacy and proceduralist social epistemology., In: *Politics, Philosophy and Economics*, Vol. 6, No. 3, 2007, p. 335.

³⁴⁹ Note that in a recent speech Peter has argued that her interpretation of reasonable pluralism is actually different to that of Rawls. While he endorses a moralized understanding, her interpretation is epistemic. That

what moral constraints are appropriate.

Rawls nevertheless assumes that all reasonable doctrines will “overlap” in viewing persons as free and equal and so this can be the basis of a reasonable overlapping consensus. Peter's conception allows for avoiding this. She does not need to make claims about what reasonable people accept or ought to accept. Instead, her theory allows for the argument that despite all disagreement, there need to be some constraints on politics (as it is collectively binding and it is in everyone's best interest to avoid being harmed by those rules). If there are to be constraints, however, it is more acceptable that they should apply to the way we make decisions than to the decisions themselves. And this is for one simple reason: With the right procedure in place, everyone can still hope that their influence within the procedure will be effective so that the outcome reflects their views. Even unreasonable people will have reason to subject to a procedure that allows them influence, even if it is at the “expense” of others having influence too. Reasonable people, on the other hand, will also agree to submit to fair procedures, because they know that this is what all can be expected to accept.

Note that Peter does not explicitly make the sort of argument that I have outlined here. Yet I believe that this is one way in which we can explicate the assumptions that underlie her claim that constraints are better applied to procedures than decisions because of the acceptability requirement³⁵⁰. She suggests that people will effectively feel more bound by particular decisions and so there will be much more controversy on what constitutes appropriate constraints for potential policies. Procedures, on the other hand, also impose constraints, but those will not feel as restrictive to people, even if they rely on substantial moral values that are – by themselves – contested. That is to say, if a procedure is structured so to give all people an equal say, I can still hope for sexist policies (which proclaim the unequal status of men and women) to go through. The interesting twist in Peter's theory is that she assumes that

is to say: He assumes disagreement between “reasonable persons”, implying that reasonableness is a moral requirement people ought to live up to (in being fair, etc.). Unreasonable persons thus drop out of focus. Peter, on the other hand, offers an epistemic interpretation of reasonable pluralism in that she assumes that people can hold different beliefs and all be justified in doing so. This is a less moralized view because it seems that mere disagreement is not the effect of some people not living up to the moral requirement of reasonableness, rather it is simply the effect of some people not having access to all relevant evidence or not judging it correctly. They thus end up holding un-justified views without thereby becoming “unreasonable” (i.e. unfair) persons. I believe this to be an extremely significant clarification that we should keep in mind. [The clarification was given in a speech Peter gave at the ERC-project conference “Authority, Legality and Legitimacy” which took place on May 20 2011 at the Law School of the University of Vienna. Peter has not yet published a paper on this topic though.]

³⁵⁰ See Peter, Fabienne: Democratic legitimacy without collective rationality., In: De Bruin, Boudewijn/Zurn, Christopher (Eds.): New waves in political philosophy., Macmillan, 2009, p. 153.

if we impose those constraints that will nevertheless not happen³⁵¹. Everyone can accept reasonable constraints on procedures, because they can still hope for outcomes that satisfy their interests. However, reasonable constraints will actually not allow for unreasonable outcomes and so the reasonable procedure will make for legitimate decisions.

Note that Peter herself acknowledges the potential problem of applying moral standards to the procedure, as she argues that it would be “*putting the cart before the horse*”³⁵² to demand too much of the procedures themselves. It is still the goal of the political decision-making process to substantiate the demands of justice, and so we may not overload it with constraints that allow only for certain outcomes and not others. Peter calls this the “*political egalitarian's dilemma*”:

*“The role of political equality in proceduralist conceptions (...) is to specify the conditions that the decision-making process has to satisfy if its results are to be legitimate. As such, the content of political equality is not itself the subject of deliberation.”*³⁵³

The basic idea, as we will see in the following sections, is to design the procedure so that the very values the procedure is based on are also subject to scrutiny, just as its outcomes are: “*all principles governing deliberative processes – whether they are substantive or procedural – should be seen as contestable and as provisional.*”³⁵⁴. Put differently: To some extent, Peter's conception needs to rely on fundamental values to constrain the political process appropriately. It is true that those values are always controversial and at the risk of biases, which is why they have to be a potential subject to the same process of legitimization that other decisions and rules are subjected to. So there are values that we apply to the process and in this sense they may seem procedure-independent. Yet they are not fully so, because they can be the subject of that same process and this is why they are permissible constraints on the political decision-making process.

³⁵¹ See Peter, Fabienne: Democratic legitimacy and proceduralist social epistemology., In: Politics, Philosophy and Economics, Vol. 6, No. 3, 2007, p. 346.

³⁵² Peter, Fabienne: Democratic legitimacy and proceduralist social epistemology., In: Politics, Philosophy and Economics, Vol. 6, No. 3, 2007, p. 340

³⁵³ Peter, Fabienne: Democratic legitimacy., Routledge, 2009, p.87

³⁵⁴ See e.g. Peter, Fabienne: Democratic legitimacy., Routledge, 2009, pp. 89-9. Also see Gutmann, Amy / Thompson, Dennis: Why deliberative democracy?, Princeton University Press, 2004.

3.1.3. Conclusion

So far I have not found any reason to reject Peter's claim for a purely proceduralist conception of legitimacy. She claims that procedures can be constrained in a way that makes additional standards for testing the legitimacy of outcomes unnecessary. She furthermore suggests that constraining procedures is more reasonably acceptable than constraining outcomes, even if both must rely on fundamental moral values. It is clear that while Peter's claim cannot be rejected at this point, we still have to evaluate the details before determining its plausibility. That is to say: So far Peter has only made claims about what an “appropriately constrained procedure” may accomplish. The question is: Does she succeed in proposing constraints for actually making a procedure live up to those claims? This is what I will try to determine in the following sections.

3.2 Political equality and epistemic fairness

Peter's conception of legitimacy is purely proceduralist in that it rejects procedure-independent standards for the evaluation of political decisions. The only source of normativity for those decisions is the fair process producing them. Now in order to generate those sorts of outcomes, the procedure has to be of a certain sort. Obviously, not just any process leads to politically legitimate outcomes. This is why Peter develops two normative conditions for the process of political-decision making: “political equality” and “epistemic fairness”. A procedure that lives up to those standards renders its outcomes acceptable, and hence legitimate. Remember that while the measure for the legitimacy of outcomes lies only in the fairness of the procedure, this is not true for the constraints applied to the procedure itself. In what follows I will evaluate the conditions proposed by Peter in order to evaluate whether they are plausible for legitimizing the outcomes of a procedure so-designed.

3.2.1 Political equality

As we have seen, Peter's conception rests on the premise that political decisions are legitimate only if they are the outcome of an appropriately constrained procedure. One of those constraints is imposed by the demand for political equality³⁵⁵. In assessing this claim three things have to be considered: First, what does Peter understand by "political equality" and what role is it supposed to play in the making of political decisions? Second, what argument does she give to support the claim that political equality is actually a reasonably acceptable condition? Third, how plausible is this argument and what possible objections are there?

As a matter of fact, there are two ways to ground a claim for political equality. On the one hand, one could argue that it is necessary for equal advancement of people's interest³⁵⁶. On the other, and this is the approach that Peter adopts, one can argue that people have equal capacities, for example to rationally judge different social states. Now since all have roughly equal capacities, it seems required that all have an equal right to use them³⁵⁷. However, this poses a problem since pluralism is at least partly the "*normal result of the exercise of human reason*"³⁵⁸. If all people have an equal capacity to use reason, and at the same time their use of reason leads to diverging outcomes, then it would seem unfair to privilege one outcome over the other. How cope with this? Peter suggests that an equal capacity to judge alternative social states ought to give people an equal right to have a say in the decision how to shape their common world. As she puts it, "*respect for reasonable value pluralism implies that people's possibility to participate in the evaluation of alternative social states is constitutive of (...) legitimacy*"³⁵⁹. The assumption of equal capacities thus leads to a claim for equal political participation of all subjects. She furthermore argues that political equality is not sufficiently realized by granting formal rights of participation³⁶⁰. The right to participation needs to be "effective", not merely nominal.

The most obvious way of criticizing Peter's account is to question either whether it is

³⁵⁵ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 132.

³⁵⁶ See e.g. Christiano, Tom: *The constitution of equality. Democratic authority and its limits*, Oxford University Press, 2008 for this sort of argument.

³⁵⁷ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 38.

³⁵⁸ Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. xvi

³⁵⁹ Peter, Fabienne: *Pure Epistemic Proceduralism*, In: *Episteme*, 2008, p. 36

³⁶⁰ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 37.

plausible that *all* people are assumed to have roughly equal capacities, or to object to her claim that this gives *all* an equal right to participate in political decisions. The latter is actually more significant. As I have argued, Rawls' concern for unreasonableness is not unjustified³⁶¹. What if people *are* unwilling to cooperate? What if people are egoistic, irrational or unwilling to be fair? Giving them a right to participate in political decisions bears the risk of the outcomes reflecting those values and, from a moral perspective, that certainly seems undesirable. It would pose a problem for legitimacy because it is doubtful that the outcomes would actually be “*acceptable*”. The standard response would be that the exclusion of unreasonable people is the “lesser evil”; i.e. that it is unfortunate to exclude them although they have an equal capacity of reason, but that since they have this capacity they also have the capacity of reasonableness and this means that their exclusion need not be permanent – they simply need to become reasonable and they will be rewarded with an equal right to political participation. This argument is not entirely implausible. Yet, there is one fundamental problem: Who are the unreasonable ones? How do we identify them? Who has the authority to judge what counts as reasonable and what does not?

It seems that in order to make a case for political equality, Peter has to argue that either there is no such thing as harmful unreasonableness or that it is impossible to correctly identify it. In fact, she opts for the second approach and in the following section I will therefore examine whether her arguments for epistemic fairness actually succeeds in supporting political equality.

3.2.2 Epistemic fairness

In addition to political equality, the second constraint that Peter calls for in the context of political decision-making is “*epistemic fairness*”³⁶². But what does this mean and how does it matter?

It seems the underlying claim is this: A political decision-making process ought to enable a

³⁶¹ See the preceding chapter on Rawls.

³⁶² See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 132.

*“learning process”*³⁶³ for the agents involved in it³⁶⁴. This requires a process of public deliberation prior to the actual decision-taking. Deliberation ought to be so that people engage in a *“mutual exchange and public scrutiny of reasons”*³⁶⁵, because those are the main input to decision-making. Reasons – not preferences – matter, because they are how we can make our own personal deliberation *accessible* to others³⁶⁶. This is important, because political decisions are collectively binding. By stating a preference for a certain social state we make the claim about how our common world is to be shaped. Since our claims affect others, they are in need of justification and so what we need to do is *explain ourselves to others*³⁶⁷. What are our reasons to endorse this view? What reasons do we believe others to have to endorse the same view? We owe to them not only to provide reasons, but a certain sort of reasons³⁶⁸, and we owe to them not only to provide reasons, but to engage in a process of reasoning together³⁶⁹. Now the claim is that the process ought to be designed so that our own preferences can transform³⁷⁰, for example because we begin to consider a point of view that we were previously unaware of. Peter argues in favor of a *“proceduralist social epistemology”*, which defines *“knowledge as what results from an appropriately designed process of inquiry”*³⁷¹.

Now the point is this: The process of political decision-making is a process of inquiry, a learning-process, aimed to determine the best “social state” and how to realize it. This is why conditions of “epistemic fairness” apply. Put simply, epistemic fairness requires that knowledge is produced in an unbiased and fair way. This means that in the process of reasoning neither the gathering of facts (or the definition of what is to count as a fact)³⁷², nor the consideration of evidence³⁷³ can be designed so to privilege certain values over others. Political equality requires that all can participate in the process of reasoning, but epistemic fairness requires that all reasons have a chance of being considered. As Peter puts it:

³⁶³ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 117

³⁶⁴ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 3.

³⁶⁵ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 33

³⁶⁶ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 32.

³⁶⁷ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 32.

³⁶⁸ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 33

³⁶⁹ Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 33

³⁷⁰ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 33.

³⁷¹ See Peter, Fabienne: *Democratic legitimacy and proceduralist social epistemology*, In: *Politics, Philosophy and Economics*, Vol. 6, No. 3, 2007.

³⁷² See Peter, Fabienne: *Pure Epistemic Proceduralism*, In: *Episteme*, 2008, p. 47.

³⁷³ See Peter, Fabienne: *Democratic legitimacy and proceduralist social epistemology*, In: *Politics, Philosophy and Economics*, Vol. 6, No. 3, 2007, p. 343.

*“pure epistemic proceduralism portrays public deliberation as an ongoing process of critical engagement and learning with conflicting representation of what the problems are, what it takes to solve them, and the reasons people have for valuing alternative options”*³⁷⁴

This means that we cannot a priori exclude certain reasons or modes of knowing as “inappropriate” (or unreasonable), because this would not be fair to the various ways in which knowledge is produced, in which reasons are “known”. One example would be “rationality”. To demand that only “rational reasoning” is appropriate for the public forum may seem uncontroversial at first sight. Yet, it allows “emotional” reasons to be excluded. Combined with the stereotype that women are the more emotional gender this might then perpetuate the idea that they simply are “worse reasoners” than men, thus justifying their exclusion³⁷⁵. Excluding modes of knowing can thus be as problematic as excluding people, because it often amounts to just that. This is why Peter states *“political and epistemic fairness are just two sides of the same coin”*³⁷⁶. Political decision-making needs to rely on a process of public reasoning that is free, open and sustained³⁷⁷, and this means that we cannot exclude people for their mode of reasoning, even if we believe them to be stupid, irrational or unreasonable.

The question is: How does epistemic fairness contribute to legitimacy? Or put differently: How is it a source of normativity? Peter provides two answers to this: First, the exchange and public scrutiny of reasons matters, because the only knowledge is that which is social³⁷⁸. Hence, the only reasons which we can rely upon in making political decisions are those which are collectively confirmed. This does not require consensus, but it requires those reasons to pass the test of public scrutiny. For example, how are we supposed to know what is reasonable, i.e. what is acceptable to others as fair terms, if we do not engage in a process of justification with others and respond to their potentially different view? Basically, the procedure envisaged by Peter is meant to help us *discover* previously unknown biases instead of avoiding those we already know about³⁷⁹. Second, the exchange of reasons matters also

³⁷⁴ Peter, Fabienne: Pure Epistemic Proceduralism., In: Episteme, 2008, p. 50

³⁷⁵ See Friedman, Marilyn: John Rawls and political coercion of unreasonable people., In: Davion, Victoria/Wolf, Clark (Eds.): The idea of a political liberalism. Essays on Rawls., Rowman & Littlefield, 2000, p. 24 for an examination of a similar idea.

³⁷⁶ Peter, Fabienne: Democratic legitimacy and proceduralist social epistemology., In: Politics, Philosophy and Economics, Vol. 6, No. 3, 2007, p. 347

³⁷⁷ See Peter, Fabienne: Pure Epistemic Proceduralism., In: Episteme, 2008, p. 43.

³⁷⁸ See Peter, Fabienne: Democratic legitimacy and proceduralist social epistemology., In: Politics, Philosophy and Economics, Vol. 6, No. 3, 2007. Note that she refers to John Dewey here.

³⁷⁹ See Peter, Fabienne: Democratic legitimacy., Routledge, 2009, pp. 134-5. She calls this the “bias-as-

because it makes the outcomes of the political decision-making process acceptable. This is because of two aspects: On the one hand, everyone has a fair chance of having their reasons considered. At the same time, even if my reasons are rejected, they may not be rejected without proper justification. Furthermore, since deliberation on social states is an on-going process, both sides' reasons and views can undergo a learning-process and transform, so that new hybrid views or reasons are produced. Even those subjected to a decision they have not supported themselves have good reason to accept it, because it is the outcome of a fair process. This, according to Peter, is the “*real argument for why the exchange of reasons matters*”³⁸⁰.

3.2.3 Conclusion: Reasons – reasoning – justification

In my view, Peter actually succeeds in making a convincing argument for why the exchange of reasons matters. They do not matter simply because they are some sort of factual basis of justification, the way Raz seems to assume³⁸¹. They matter, because they are what people can use to justify things *to each other*. This means that reasons are a way of responding to Simmons' requirements of particularity and actualness³⁸² – but only if we interpret justification procedurally as well as socially, as “intersubjective reasoning” the way Peter proposes. The conditions of political equality and epistemic fairness hence seem convincing as legitimizing criteria for a political decision-making process. Outcomes that are generated through a public deliberative process defined this way are indeed acceptable, and since – as I have argued before in the context of Rawls – acceptability is a plausible criterion for legitimacy, the outcomes thus generated are legitimate.

Remember that I also criticized Raz' theory for not giving an account of what reasons actually matter. He argues that legitimacy depends on authority making us better comply with reasons³⁸³. But which reasons exactly is he talking about? It seems there are different sorts of reasons and not all of them ought to be relevant for the political context. For example, rain

resources”-view.

³⁸⁰ Peter, Fabienne: Democratic legitimacy., Routledge, 2009, p. 116

³⁸¹ See Raz, Joseph: Reason, reasons and normativity., In: Oxford Studies in Metaethics, Vol. 5, 2010. Also see Korsgaard, Christine: The constitution of agency. Essays on practical reason and moral psychology., Oxford University Press, 2008, pp. 209-10.

³⁸² See the preceding chapter on Simmons of this paper.

³⁸³ See the preceding chapter on Raz for an explication and evaluation of his “Normal Justification Thesis”.

provides a person with a reason to use an umbrella. One could call this a valid reason, perhaps a “reason of prudence”. Yet it seems dubious that an authority would only be legitimate if it makes me comply with those sorts of reasons. In contrast, Rawls' notion of public reason is meant to specify what sort of reasons matter in the political context: those, that are reasonably acceptable to all³⁸⁴. This suggests that only those decisions can be enforced that are based on reasons all reasonable people can share. This is indeed a plausible restriction, yet I am unconvinced that it could actually solve the problem at hand, because is not rain a “reasonably acceptable” reason to use an umbrella? Christine Korsgaard has actually argued that “*the only reasons that are possible are the reasons we can share*”³⁸⁵. This suggests that it is the very nature of reasons that they are potentially shareable among those who have the capacity of reason. Does this mean that all reasons are acceptable as the basis of political decisions? Perhaps not if we take Rawls' theory to mean that only those reasons that are *acceptable as the basis of collectively binding political decisions* provide legitimate justification. This is plausible, but not very satisfactory, because yet again it does not really give us an explicit account of which reasons this is true for.

Can Peter solve this problem? One might deny it, arguing that Peter's conception is actually faced with the same problem. She argues that only “public” reasons, i.e. reasons “*of a form that makes them potentially accessible to others*”³⁸⁶, are legitimate as a basis for political decisions and this seems very similar to Rawls' account. Yet, this is not the core of her theory. The core of her conception of legitimacy is that she invokes a *procedural* interpretation of Rawls' idea of public reason³⁸⁷. Along those lines one could suggest that the question what reasons can form the basis of legitimate political decisions is a misleading question in the first place, because what reasons matter cannot be determined without a social process of reasoning. Reasons are normatively basic, but their normative force is realized only procedurally through the process of reasoning. To be collectively binding, though, the process itself ought to be collective too, this is where Peter's claim for the “social” aspect stems from.

I thus conclude that Peter's normative condition of legitimacy is actually both plausible and

³⁸⁴ See the preceding chapter on Rawls for an explication and evaluation of his idea of public reason.

³⁸⁵ Korsgaard, Christine: The reasons we can share. An attack on the distinction between agent-relative and agent-neutral values., In: Social Philosophy and Policy, Vol. 10, No. 1, 1993, p. 33

³⁸⁶ Peter, Fabienne: Democratic legitimacy., Routledge, 2009, p. 33

³⁸⁷ See Peter, Fabienne: Democratic legitimacy., Routledge, 2009, p. 5. See the preceding chapter on Rawls for an analysis of his own use of the concept of public reason.

persuasive. She manages to account for the normative force of reasons, but due to her procedural interpretation she avoids running into the problem of having to distinguish between reasons that count and those that are inappropriate for the political context. She is convincing in her argument that the normative condition of justification is not satisfied by the mere presentation of reasons, but only through a process of reasoning that is reciprocal as well as responsive. This means that she does not have to exclude the unreasonable the way Rawls does and I believe that from a moral perspective this is desirable. All in all, this means that legitimacy is satisfied if political decisions are the outcome of a process that satisfies political equality and epistemic fairness. The more the exercise of political authority lives up to this condition, the more legitimate it is. Does this mean democracy is necessary for legitimate political authority? This is the question I seek to answer in the following section.

3.3. Democracy

So far I have examined whether pure proceduralism can form a viable basis for legitimacy and whether the specific procedural design suggested by Peter is plausible. Now I turn to an aspect I have so far neglected in dealing with Peter's theory: democracy³⁸⁸. As with Rawls, Peter too, sets out to develop conditions of legitimacy meant to apply to democratic decision-making³⁸⁹. At the same time, however, she claims that democracy is an “*irreducible component of*” legitimacy³⁹⁰. What does that mean; what role is democracy supposed to play in Peter's theory? Is it meant as a restriction of scope or as a normative condition?

As a matter of fact, I will argue that Peter is not clear on this and this poses a significant problem for the coherence of her theory. First, however, we need to take a look at what indications Peter gives for either of the two interpretations.

In a previous chapter I have specified the notion of political legitimacy so that it applies to *political* procedures only. Along those lines it would stand to reason that “democratic

³⁸⁸ Note that I have already outlined a similar argument in an earlier MA paper of mine, “Democratic franchise and legitimacy. An analysis with reference to England's history of electoral law.”, produced in 2010 (to be found online at: http://othes.univie.ac.at/11139/1/2010-09-12_0500608.pdf, last visited on 16 May 2011, 13:19).

³⁸⁹ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 2.

³⁹⁰ Peter, Fabienne: *Pure Epistemic Proceduralism*, In: *Episteme*, 2008, p. 36

legitimacy” – since democracy is defined as a particular form of politics – is a concept applying only to *democratic* procedures. Furthermore, if political legitimacy is understood normatively, as specifying conditions that politics ought to live up to, democratic legitimacy could be assumed to set standards *for* specifically democratic politics. However, one implication may strike us as odd: If democracy is nothing but a particular form of politics – why should we need a specialized concept of legitimacy at all? It would mean either that conceptions of political legitimacy are too crude or too general than to apply to democracy, or that democracy is so distinct from other forms of political procedures that a conception of political legitimacy needs to at least be supplemented, i.e. supplemented to such an extent that it makes sense to call it a conception of its own. Viewing democratic legitimacy this way would have the implication that the normative conditions thus developed are not valid for other forms of politics, at least not before a separate argument has been made to prove that. Put differently, those normative conditions would not be universal, but would only be apt to legitimize the exercise of democratic authority. Other forms of political authority could depend on rather different normative standards of legitimacy. At several points, it seems to me that Peter might actually endorse that view, for example right at the beginning of her book “Democratic legitimacy”, when she states:

*“my aim (...) is to offer a systematic treatment of the requirements of democratic legitimacy, interpreted as the set of conditions that apply to the evaluation of democratic decision-making.”*³⁹¹

True, she does not specifically state that democracy is the only form of politics that her conditions are meant for. However, what she does state is that she develops condition to apply *to* democracy. Democracy is then the subject, not a condition, of evaluation.

Yet when proceeding to read her book, we actually get a rather different picture: Instead of viewing democratic legitimacy as a specialized version of political legitimacy (in the sense that it specifies normative conditions for a particular political process – democracy), she seems to assume that it is not just one version of, but essentially itself a requirement of political legitimacy. Only if a political procedure is democratic and lives up to the normative

³⁹¹ Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 2

ideals associated with that, it can be called legitimate at all. For example, Peter rejects what she calls democratic instrumentalism for that it “*wrongly denies how democratic procedures are constitutive for legitimacy*”³⁹² and demands that “*democratic procedures are (...) necessary for legitimacy*”³⁹³. This suggests that there is virtually no legitimacy outside democracy. Political legitimacy, essentially, is democratic legitimacy, and democracy thereby becomes part of the measure instead of a procedure to be evaluated.

It seems to me that this latter claim can only rely on an argument (or assumption) of the following kind: In a first step, requirements of legitimacy are developed (= “stage one”). In Peter's case, this means defending a purely proceduralist conception of legitimacy that relies on the values of political equality and epistemic fairness³⁹⁴. Second, one shows how democratic political procedures satisfy those conditions (= “stage two”). For instance, Peter claims that deliberative democracy³⁹⁵ can actually satisfy the requirements of legitimacy, because it allows for public deliberation that can be regulated by the principles of political equality and epistemic fairness. The act of voting does not violate legitimacy as long as it is a way of selecting a particular outcome “for now”, not thereby ending the process of deliberation. Finally, it is concluded that the fact that democracy lives up to legitimacy is proof that the democratic procedure itself is a requirement of legitimacy. The premise of this claim is that the democratic process does not only live up to those standards, but that it is unique in doing so, and that it is thus the *only* political procedure that satisfies the conditions of legitimacy (= “stage three”). This last claim is actually central, because just because a procedure lives up to certain standards does not mean that it becomes *necessary* for realizing them. This is true only if that procedure is the *only* way to realize them. Note that Peter actually does not provide any argument for this third stage. This is to say, she does not make any effort to rule out other forms of government as potentially realizing her conditions of legitimacy. Instead, she simply assumes that since democracy can be legitimate, it is necessary for realizing it and thus itself required³⁹⁶.

Where does this leave us? In my view, contrasting the two possible interpretations actually makes Peter's approach seem highly questionable. If we look at the structure of an argument

³⁹² Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 64

³⁹³ Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 65

³⁹⁴ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 3.

³⁹⁵ See Peter, Fabienne: *Democratic legitimacy*, Routledge, 2009, p. 3.

³⁹⁶ See e.g. Peter, Fabienne: *Pure Epistemic Proceduralism*, In: *Episteme*, 2008, p. 36.

necessary to support the claim that democracy is a requirement of legitimacy, then it seems that it all falls apart if one assumes democracy as a premise. Stage one is to develop plausible conditions of legitimacy, stage two is to show how democracy can realize them. Now, if democracy is already assumed during the first stage (because what one means to do is find conditions of legitimacy *for* democracy), then stage two seems irrelevant. That is to say – if democracy can realize conditions of legitimacy that were actually developed *for democracy* then that is no great finding. All it goes to show is that one has developed coherent principles.

In addition to that, stage three seems even more problematic. On the one hand, it is dubious that she actually does not provide an argument for why democracy is uniquely able to realize requirements of legitimacy. Perhaps it is not uncommon to assume, for example, that democracy is the only way to properly realize political equality. However, I believe that from an analytical perspective there still is need for argumentation. Beyond that, I am uncertain of the implication that stage three has for the normative nature of Peter's theory, because it makes it seem as if the conditions of legitimacy are not external to democracy, but constitute its very nature. It boils down to the assumption that democracy needs to satisfy certain conditions in order to be legitimate, but only if it is legitimate it even counts as democratic – there is no truly democratic illegitimate democracy³⁹⁷. To put it differently: From a normative perspective, democratic legitimacy is supposed to be a conception that specifies standards which democracy ought to live up to, but which it does not necessarily do live up to. If it does, it is a legitimate, if it is not, it may not be legitimate, but it is nevertheless democratic. In contrast, incorporating democracy within the notion of political legitimacy itself means that there is no standard to actually evaluate democracy's own legitimacy. This is because political legitimacy requires it is democratic. If it is democratic it is thus legitimate. Hence, it is legitimate because it is democratic, not because it lives up to an external normative standard. This implies that what counts as legitimate authority is derived from some conception of democratic legitimacy.

The conclusion I am left with is that Peter is actually not clear about the role of democracy in her theory. It seems to me that what she wants to claim is that democracy is necessary. Yet she does not provide an argument for it. Instead she merely presumes it. Even as a premise,

³⁹⁷ Note that Roland Pennock, too, has observed that “*much of the criticism of democracy heard today is in the name of the ideal. It claims only that democratic institutions are not working democratically.*” (Pennock, Roland: *Democratic Political Theory*, Princeton University Press, 1979, p. 122).

though, democracy's significance is not unambiguous. From the way she frames the aim of her work it seems as if democracy is a premise, but the way she refers to it throughout her argument makes it seem as if she presumes it as a normative requirement, implying that there is no legitimacy without democracy. In the end I find this to be a significant weakness of Peter's theory.

4. Conclusion

In the present chapter I have set out to explicate and evaluate the conception of legitimacy as presented by Fabienne Peter. She actually defends a purely proceduralist interpretation of legitimacy, arguing that normative conditions apply to the political decision-making process, not its outcomes. The conditions she argues for are “political equality” and “epistemic fairness” and both call for an inclusive deliberative procedure.

In my assessment I have not found any reason to reject Peter's claim for a purely proceduralist conception of legitimacy. It is actually plausible that we do not need any additional standards for testing the legitimacy of outcomes if the procedure itself is designed appropriately, i.e. so that the outcomes are acceptable. It also seems convincing that standards are more reasonably acceptable if applied to the process rather than the decisions. Turning to the normative conditions themselves I concluded that they are indeed persuasive in a way that make them seem superior to those proposed by Raz, Simmons or Rawls. Peter argues that legitimacy requires an actual process of reasoning and justification among all those who are subject to a political authority. Through this process the outcomes are made acceptable to the affected people, but at the same time its inclusiveness allows for a learning-process and the production of knowledge. Reasons are discovered, shared and produced and this is what the normative force of the process stems from.

Peter thus manages to account for the normative force of reasons, but due to her procedural interpretation she avoids running into the problem of having to define “reasonable” reasons and is therefore not forced to exclude unreasonable people from the process of justification. However, despite the convincing account of legitimacy she proposes, Peter's theory is actually

problematic when it comes to the role of democracy. She presumes a lot without providing much of an argument, and it seems to me that she is not clear on what role she wants to claim for this particular form of politics. This, I suggest, is an aspect of her work regarding which some more clarification would be in order

VII. CONCLUSION

In the present paper I have dealt with the subject of political authority from the normative perspective of legitimacy. The focus was on different normative conditions of legitimacy, i.e. on those moral conditions which lend authority normative force. For me the central research question was what conception of legitimacy provides the most plausible normative condition of legitimate political authority and I proceeded by evaluating four different proposals.

First, I turned to the theory of Joseph Raz. He proposes two normative conditions, the more important of which is the Normal Justification Thesis (NJT). It states that legitimacy depends on whether we comply better or worse with our applying reasons when subjecting to the authority's rule. The second normative condition, consent, can render an authority's rule legitimate beyond the scope of the NJT, but only if that authority is at least reasonably just. What is interesting is that the obligation arising from both, the NJT and consent, depends on the same normative basis: reasons. An authority is legitimate if it is justified, and this justification depends on practical reasons which exist independent of the authority's rule and which oblige the individual whether they are under an authority or not. In fact I found Raz' view that legitimacy depends on justification intuitively appealing. Yet, it seemed to me that his account is not plausible in the way he tries to conceptualize the normative force of reasons. For example it is not obvious why individual "compliance" to reasons is the most fundamental moral goal and thus the legitimizing condition of authority. Even if it is, however, it seems that Raz would have to clarify or limit what the relevant reasons are, because it is not convincing that all reasons matter equally. For example, rain might give us a practical reason to carry an umbrella, but even if compliance to this reason could be seen as an obligation (and I am actually not sure that it should), it seems trivial at best and this would

only make for a rather feeble basis for legitimization. Beyond that, I think we should question whether reasons are actually just “there” applying to us as Raz would have us believe. The way he puts it, reasons are very much like raindrops that happen to fall on us, but this account of practical reason is rather dissatisfying and does not capture our actual experience of practical reasoning as active process of the mind.

In the second chapter I turned to the theory of John Simmons. For him it is central that legitimate authority has to be distinguished from merely justified authority, because the latter – while rationally desirable and morally permissible – does not infuse the subjects with an obligation to obey. The reason for this is that all persons are born free, and therefore they can be under no obligation unless they themselves defer the right to make binding decisions. Legitimacy therefore depends on the free consent of individuals, because only this transaction can found the special link between an authority and its subjects. Furthermore, only if the subjects have consented to an authority's rule they are motivated to comply with their obligations, and this is relevant because only an effective authority can be a legitimate authority. The main objection I have raised against all of these arguments for consent is that I do not believe it actually has the normative force ascribed by Simmons. It seems to me that consent can only be binding if it does not oppose morally fundamental reasons or rights, and when it is binding it is so because it lives up to those reasons. Actual consent does indeed have moral significance, especially when it comes to responsibility and self-esteem, yet I reject the view that it establishes legitimacy. Moreover, I am not convinced by Simmons' argument that consent is the most effective way to ensure the subjects' motivation. It is plausible that we feel bound by what we perceive to be our *reasons* for consenting, not so much by our actual consent. Despite his neglect for the normative force of reasons, though, I found that Simmons' demand for actualness and particularity in the context of legitimization is significant and indeed helps us make sense of a fundamental moral intuition – normativity has to attach to us personally in order to be binding.

The third conception of legitimate authority that I have analyzed is that of John Rawls. I argued that his theory allows for the explication of three related normative conditions. First there is the notion of “reasonable acceptability”. I argued that it is plausible to view legitimacy in terms of justification and in turn to rely on “acceptability” as the central measure. However, I believe it to be problematic to distinguish between reasonable and unreasonable persons the way Rawls does. On the one hand, there is the risk of undetected

biases in the very definition of reasonableness. On the other, while it is plausible that unreasonable people's acceptance or non-acceptance should not be a measure for legitimacy, it seems paternalistic to exclude them from the process of public justification. Rawls' second normative condition is "hypothetical consent". I argued that thought-experiments can be helpful to take an impartial view, but that I believe Rawls to be too optimistic when it comes to the results of sincerity. That is to say, if I sincerely believe my views are reasonable, looking for objections inside my head, even if I try to adopt an "impartial" view, will probably not yield any new outcomes, because my mind can only hold those objections that I am already aware of. Last I evaluated "political justification" as a normative condition. Rawls thereby states that legitimacy does not only depend on what is reasonable, but it depends on what "all" can reasonably be expected to endorse. He believes that there is an "overlapping consensus" among all reasonable comprehensive doctrines and that this is the proper basis for the justification of political authority. The central ideas are: society being a (fair) system of cooperation and citizens being free and equal. I am not fully convinced by Rawls' assumption that those ideas are such that no-one can reasonably reject them, because he does not provide any argumentation. This I believe to be a central weakness of his approach, because his conception of legitimacy relies on substantive values that he does not explicitly defend. I concluded that there are two major merits to Rawls' theory. First, he provides a plausible argument for why reasons matter (because they are what we can share so to justify political authority) and what kind of reasons legitimacy depends on (those reasons that we can share). In this sense his approach seems superior to that of Raz, because he too accounts for the normative force of reasons, but his explication is more plausible. Second, I find Rawls' understanding of freedom both compelling and plausible. Autonomy does not require that the only obligations we have are those that we are willing to accept, but it only requires that those obligations are reasonably acceptable to us, i.e. that they can be justified to us in terms that we can accept. Here, I believe Rawls' theory to be superior to that of Simmons, because his notion of freedom is less totalistic and can account for the moral force of justification. Nevertheless, I also find that in this context there is a major weakness in Rawls' theory, because he is too unconcerned with presupposing substantive notions like that of "reasonableness" and he thereby ignores the risk of biases. By excluding unreasonable people from the legitimization pool he also seems to exclude them from the process of public justification and I find that highly problematic. What I was wondering is: Do we not owe reasons especially to those who *do* object against our views (even if it is because they are unreasonable)?

Last, I turned to the conception of legitimacy presented by Fabienne Peter. She defends a purely proceduralist interpretation of legitimacy, arguing that normative conditions apply to the political decision-making process, not its outcomes. The conditions she argues for are “political equality” and “epistemic fairness” and both call for an inclusive deliberative procedure. In my assessment I have not found any reason to reject her claim for a purely proceduralist conception of legitimacy. It is actually plausible that we do not need any additional standards for testing the legitimacy of outcomes if the procedure itself is designed appropriately, i.e. so that the outcomes are acceptable. It also seems convincing that standards are more reasonably acceptable if applied to the process rather than the decisions. Turning to the normative conditions themselves I found that they are indeed persuasive in a way that make them seem superior to those proposed by Raz, Simmons or Rawls. She argues that legitimacy requires an actual process of reasoning and justification among all those who are subject to a political authority. Through this process, the outcomes are made acceptable to the affected people, but at the same time its inclusiveness allows for a learning-process and the production of knowledge. Reasons are discovered, shared and produced and this is what the normative force of the process stems from.

This is why I conclude that Peter's conception of legitimacy is actually the most plausible of the assessed theories. She manages to account for the normative force of reasons, but in a way that also accounts for the special nature of political authority. Political decisions are collectively binding and coercively enforceable. Legitimacy is therefore realized only if political decisions are (in general) acceptable to all those subjects to the authority. This cannot exclude unreasonable people, because they too are subject and have a right to justification. Justification, however, cannot consist merely in having “good” or reasonable reasons to hold a certain view or to enforce a certain decision, and that is for two reasons: On the one hand, there is the risk of bias. On the other, the autonomy and equal capacity of persons means that we owe them our attention. It is not sufficient to have good reasons, but we need to actually offer them to others. Reasoning cannot be a one-way-street, instead it needs to be a reciprocal process where people are responsive to each other's reasons. Political decisions must therefore rely on an actual process of reasoning and justification among the authority and its subjects and among the subjects responsively. Only if this condition is satisfied, and if certain normative conditions hold, legitimacy is realized. That is to say, the more a political authority relies on a political decision-making process so designed, the more legitimate it is.

Now, the obvious question that is to follow at this point is whether this renders democracy necessary for legitimacy. Peter indeed makes that assumption and the normative conditions she defends sure seem to ring all the right bells for democratic theorists. Yet I am not entirely convinced that one could not make an argument to show that democracy, or the act of voting, is not as necessary as some would have us believe – even if the process of reasoning under conditions of equality and epistemic fairness are accepted. In any case the examined argumentation is insufficient to ground the claim that democracy is more than permissible as a form of legitimate political authority. Further details would have to be provided so to exclude all other forms of government from potential legitimacy, but this project exceeds the scope of the present paper. I conclude that we should be cautious to simply presuppose democracy, as its defense is at the core of a fundamental normative discussion we should not skip through.

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Berufserfahrung

- **2005-2009** **Konzeption und Durchführung individueller Matura-Vorbereitungs-Kurse**
- **08/2005** **Ferialpraktikum Billing/Customer Service** (Mobilfunkanbieter)
- **03-11/2006** **Kundenberatung zu Neuerscheinungen** (Buchhandlung)
- **07/2007** **Ferialpraktikum Human Resources** (Mobilfunkanbieter)
- **09/2007-12/2008** **Projekt-Assistenz** (Mobilfunkanbieter)
- **03-08/2008** **Welcome Desk** (Mobilfunkanbieter)
- **seit 07/2009** **Human Resources** (Telekommunikationsunternehmen)

